Supreme Court of the United States

OCTOBER TERM, 1966

No. 781

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

vs.

GREAT DANE TRAILERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22,427

NATIONAL LABOR RELATIONS BOARD, PETITIONER

versus

GREAT DANE TRAILERS, INC., RESPONDENT

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD—March 23, 1965

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq., as amended by 73 Stat. 519), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondent, Great Dane Trailers, Inc., its officers, agents, successors, and assigns. Case No. 10-CA-5518.

In support of this petition the Board respectfully shows:

(1) Respondent is engaged in business in the State of Georgia, within this judicial circuit where the unfair labor practices occurred. This Court therefore has juris- [fol. 2] diction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on December 16, 1964, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, Great Dane Trailers, Inc., its officers, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid bear-

ing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, and pursuant to Rule 38(1) of this Court, the Board is certifying and filing with this Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony, and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, [fol. 3] and requiring Respondent, Great Dane Trailers, Inc., its officers, agents, successors, and assigns, to comply therewith.

(Signed) MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor
Relations Board

Dated at Washington, D. C.
this 23rd day of March, 1965.

IN THE UNITED STATES COURT OF APPEALS

ORDER TO FILE PETITION—Filed March 25, 1965.

* * * *

A Petition for Enforcement of an Order of the National Labor Relations Board made December 16, 1964 in the proceeding known upon the record of the Board as Case No. 10-CA-5518, having been presented to this Court;

IT IS ORDERED that said Petition be filed and the case docketed as of March 25, 1965.

IT IS FURTHER ORDERED that the National Labor Relations Board file with the Clerk, a certified copy of the transcript of proceedings, or in lieu thereof, a certified list of all the documents, transcripts of testimony, exhibits and other material comprising the record of the [fol. 4] proceeding before the National Labor Relations Board, in the above entitled matter, within forty (40) days from this date as required by Rule 38, as amended.

EDWARD W. WADSWORTH
Clerk of the United States
Court of Appeals for the
Fifth Circuit.

(Signed) CLARA R. JAMES
Chief Deputy Clerk
For the Court
By Direction

IN THE UNITED STATES COURT OF APPEALS

ANSWER—April 8, 1965

* * * *

TO: The Honorable, The Judges of the United States Court of Appeals for the Fifth Circuit:

Comes now GREAT DANE TRAILERS, INC., Respondent in the above-captioned cause, by its undersigned attorneys, and pursuant to Rule 38(2) of this Court, respectfully files this its Answer to the Petition heretofore filed herein, and shows:

1. The findings of the Petitioner with respect to questions of fact in Petitioner's Decision and Order dated December 16, 1964, are not supported by substantial evidence on the record considered as a whole.

2. The findings of fact and conclusions of law of the [fol. 5] Petitioner in said Decision and Order are not supported by the evidence.

3. The Petitioner's findings of fact and conclusions of law in said Decision and Order are contrary to the evidence.

4. The Order of the Petitioner is not supported by the evidence.

5. The Order of the Petitioner is contrary to the law.

6. The Decision and Order of the Petitioner is not supported by a preponderance of the testimony taken by the Petitioner.

7. Respondent denies that it committed any unfair labor practices within the meaning of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. Sec. 151, et seq., as amended by 73 Stat. 519.

8. All parts of said Order ordering the Respondent to take affirmative steps and action are improper, illegal, without support in fact, contrary to the evidence and contrary to the law.

9. All part of said Order ordering the Respondent to cease and desist certain actions are improper, illegal, without support in fact, contrary to the evidence and contrary to the law.

WHEREFORE, Respondent prays that this Honorable Court deny said Petition of the Petitioner in each and [fol. 6] every respect and set aside the Order of the Petitioner in its entirety.

Dated at Jacksonville, Florida, this 8 day of April, 1965.

HAMILTON, BOWDEN & COFFMAN

(Signed) O. R. T. BOWDEN
Attorneys for Respondent

Address of Counsel:

Hamilton, Bowden & Coffman
1056 Hendricks Avenue
Jacksonville, Florida 32207

[Certificate of Service (omitted in printing)]

[fol. 7]

IN THE UNITED STATES COURT OF APPEALS

CERTIFIED LIST OF THE NATIONAL LABOR RELATIONS BOARD—April 30, 1965

* * * *

The National Labor Relations Board by its Executive Secretary, duly authorized by Section 102.115, Rules and Regulations of the National Labor Relations Board - Series 8, hereby certifies that the list set forth below constitutes a full and accurate transcript of the entire record of a proceeding had before said Board and known upon its records as Case No. 10-CA-5518. Such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

VOLUME I - Exhibits introduced into evidence:

General Counsel's Exhibits: [1]

1-a thru 1-f
2 and 3

Respondent's Exhibits:

1 thru 4

VOLUME II *CERTIFIED RECORD*

Stenographic transcript of testimony taken before Trial Examiner Joseph I. Nachman on May 19, 1964 ..... 1 - 123

[fol. 8]

VOLUME III - Pleadings

1. Copy of Trial Examiner Joseph I. Nachman's Decision issued on July 15, 1964 .... 1 - 9
2. Copy of Respondent's exceptions received July 31, 1964 ..... 1 - 3

[1] General Counsel's Exhibits 1-a, 1-b, 1-c, 1-e are Pleadings and are contained in Volume III of the Board's Certified Record.

3. Copy of Respondent's amended exceptions received August 5, 1964 ..... 1 - 7
4. Copy of Decision and Order issued by the National Labor Relations Board on December 16, 1964 ..... 1 - 3

IN TESTIMONY WHEREOF, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 30th day of April 1965.

(Signed) OGDEN W. FIELDS
Executive Secretary
National Labor
Relations Board

[SEAL]

[fol. 9] BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 10-CA-5518

* * * *

ANSWER—April 20, 1963

Comes now Great Dane Trailers, Inc. and for answer to the complaint filed herein, thereto answering says:

I

That it admits the allegations as contained in paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 9 and 10 of said complaint.

II

That it denies the allegations as contained in paragraphs 12, 13, 14 and 15 of said complaint.

III

As to paragraph number 8 of said complaint, the respondent admits that vacation pay was distributed to respondent's production and maintenance employees on or about July 1 in the years 1960, 1961 and 1962, but denies that said vacation pay was payable to employees on July 1, 1963.

IV

As to paragraph number 11, respondent states that said economic strikers, who had been replaced, were not entitled to vacation pay on July 1, 1963, that under the terms of the expired contract, they had not qualified therefore.

[fol. 10] WHEREFORE, having fully answered the complaint, the respondent moves for its dismissal.

Dated this 20th day of April, 1963.

(Signed) HAMILTON & BOWDEN
O. R. T. BOWDEN
Attorneys for
Great Dane Trailers, Inc.

Address of Counsel:

Hamilton & Bowden
1056 Hendricks Avenue
Jacksonville 7, Florida.

[Certificate of Service (omitted in printing)]

[fol. 11] BEFORE THE
NATIONAL LABOR RELATIONS BOARD

COMPLAINT AND NOTICE OF HEARING—April 10, 1964

* * * *

It having been charged by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local No. 26, AFL-CIO, herein called the Union, that Great Dane Trailers, Inc., herein called Respondent, has engaged in, and is engaging in, unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, as amended, 29 U. S. C. Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for the Tenth Region, issues this Complaint and Notice of Hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended:

1.

A copy of the charge, filed on October 25, 1963, was served upon Respondent by registered mail on October 25, 1963.

2.

Respondent is, and has been at all times material herein, a Georgia corporation, with its principal office and place of business located at Savannah, Georgia, where it is engaged in the manufacture and sale of truck trailers.

[fol. 12] 3.

Respondent, during the past calendar year, which period is representative of all times material herein, sold and shipped finished products valued in excess of $50,000 to customers located outside the State of Georgia.

4.

Respondent is, and has been at all times material herein, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

5.

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

6.

Personnel Director Stephen Docie and Foreman James Griner and Arthur Davis are and have been at all times material herein supervisors within the meaning of Section 2(11) of the Act.

7.

On April 1, 1960, Respondent and Union entered into a collective bargaining contract covering Respondent's production and maintenance employees.

[fol. 13]

8.

Pursuant to Article VIH, of said Contract, vacation pay was distributed to Respondent's production and maintenance employees on or about July 1, in the years 1960, 1961 and 1962, and was payable to such employees on July 1, 1963.

9.

On or about May 17, 1963, certain employees of Respondent ceased work concertedly and went out on strike.

10.

Striking employees of Respondent, during the months of May, June and July, 1963 requested that Respondent distribute to them vacation pay due them under said Contract Article VIII.

11.

Respondent failed and refused to distribute said vacation pay, and continues to refuse to distribute vacation pay to its striking employees.

12.

Respondent failed and refused to distribute said vacation pay to its striking employees because of their membership in and activities on behalf of the Union, and because they engaged in concerted activities with other employees for the purposes of collective bargaining and other mutual aid and protection.

[fol. 14]

13.

Respondent, by its following-named supervisors and agents, on or about the dates set opposite their respective names, in the vicinity of its plant, individually solicited its employees to abandon the strike, and promised them prompt payment of vacation pay and job promotion if they abandoned the strike and returned to work:

Personnel Director Stephen Docie	May 24, 1963
Foreman James Griner	September 20, 1963
Foreman Arthur Davis	November 14, 1963

14.

Each of the acts of Respondent alleged in paragraph 13 above constitutes unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

15.

The acts of Respondent alleged in paragraphs 11 and 12 above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2 (6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 19th day of May, 1964, at 10:00 a.m. (Eastern Standard Time), in the U. S. Post Office and Courthouse, Savannah, Georgia, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at [fol. 15] which time and place you will have the right to appear in person, or otherwise, and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Respondent shall file with the Regional Director, acting in this matter as agent of the Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof, and that unless it does so, all of the allegations in said Complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated at Atlanta, Georgia, this 10th day of April, 1964.

(Signed) WALTER C. PHILLIPS
Regional Director
Tenth Region
National Labor
Relations Board
528 Peachtree-Seventh
Building
Atlanta, Georgia 30323

[SEAL]

[fol. 16] BEFORE THE
NATIONAL LABOR RELATIONS BOARD

October 25, 1963

Re: Case No. 10-CA-5518

Great Dane Trailers, Inc.
Lathrop Avenue
Savannah, Georgia

Gentlemen:

Please be advised that a Charge has been filed with this office alleging that you have engaged in unfair labor practices in violation of the National Labor Relations Act, as amended. Enclosed herewith you will find a copy of such charge for your notice and information.

The investigation of this matter has been assigned to Supervising Attorney Louis Lipsitz, whose address is shown above.

I would appreciate receiving from you a written statement of your position respecting the allegations set forth in the Charge. Please feel free to present in support of such statement affidavits and such records as may be necessary for full presentation of your position.

During the course of this investigation I will appreciate your cooperating fully with the members of this staff. In the event you desire any further information please [fol. 17] feel free to call upon the Supervisor handling this matter.

Very truly yours,

(Signed) WALTER C. PHILLIPS
Regional Director

Enclosures:

Charge (1) 435627
Notice (1)

REGISTERED MAIL
RETURN RECEIPT REQUESTED

[Certificate of service and acknowledgment (omitted in printing)]

[fol. 19] * * * *

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER—Filed October 25, 1963

INSTRUCTIONS: File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No.
10-CA-5518

[fol. 20] Date Filed
10-25-63

1. Employer Against Whom Charge Is Brought

Name of Employer
Great Dane Trailers, Inc.

Number of Workers Employed
Approx. 400

Address of Establishment (Street and number, city, zone, and State)
Lathrop Avenue
Savannah, Georgia

Type of Establishment (Factory, mine, wholesaler, etc.)
Factory

Identify principal product or service
Trailers

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a), subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.
(List subsections)

2. Basis of the Carge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

The Employer, in order to discourage membership in a labor organization, discriminated in regard to

[fol. 21] the hire and tenure of employment and to the terms and conditions of employment of all its production and maintenance employees since on or about May 17, 1963, and thereafter.

By these and other acts and conduct the Employer interfered with, restrained and coerced its employees in the exercise of their rights as guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (if labor organization, give full name, including local name and number)

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local No. 26, AFL-CIO

4. Address (Street and number, city, zone, and State)
P. O. Box 1365, Birmingham, Alabama 35201

Telephone No.
Tr. 9-4497

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO

[fol. 22] 6. Declaration

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

(Signed) CLIFFORD L. STAVE
CLIFFORD L. STAVE
(Signature of representative or person filing charge)
Staff Representative
(Title, if any)

October 22, 1963
(Date)

Willfully false statements on this charge can be punished by fine and imprisonment (U.S. Code, Title 18, Section 1001)

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

TXD-392-64
Savannah, Ga.

TRIAL EXAMINER'S DECISION—July 15, 1964

* * * * *

This complaint [1] under Section 10(b) of the National Labor Relations Act, as amended (herein called the Act), heard before the undersigned at Savannah, Georgia, on May 19, 1964, involves allegations that Great Dane [fol. 23] Trailer, Inc. (herein called Respondent or Company), violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to pay certain employees vacation pay allegedly because they engaged in a strike and other concerted activities on behalf of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Local No. 26, AFL-CIO (herein called the Union or Local 26), and otherwise threatened, coerced, and restrained its employees in violation of Section 8(a)(1) of the Act. The General Counsel and Respondent participated fully in the hearing, and were afforded an opportunity to adduce evidence to examine and cross-examine witnesses, and argue orally on the record. Oral argument was waived. Briefs on behalf of the General Counsel and Respondent, respectively, have been received and duly considered.

Upon the entire record in the case, including my observation of the witnesses, I make the following:

Finding of Fact [2]

I. The unfair labor practice involved

A. *Background*

For some years the Union has been the collective-bargaining representative of the employees at Respond-

[1] Issued April 10, 1964, on a charge filed October 25, 1963.

[2] No issue of commerce or labor organization is presented. The complaint alleges and the answer admits the necessary factual averments in this regard. I find the facts as pleaded.

ent's Savannah, Georgia, plant. The last contract was effective by its terms, from April 1, 1960, through March 31, 1963, and thereafter from year to year, absent notice, [fol. 24] but terminable under certain circumstances upon 15 days' notice. Article VIII of this contract is entitled "Vacations," and contains the following provisions:

(a) Each qualified employee covered by this agreement shall be entitled after one (1) year of continuous employment, at a time agreeable to the Company, to a vacation of seven (7) consecutive days with pay for forty (40) hours at the rate of pay existing for such employee at the time of the beginning of his vacation. Each employee after five (5) years continuous service, shall be entitled to a vacacation of fourteen (14) consecutive days, with pay for eighty (80) hours. Any employee entitled to a vacation with pay may waive the right, if his services are needed by the employer, to such vacation during the period of this agreement, and in such cases shall be entitled to receive in lieu thereof, at the time he becomes entitled to the vacation, the amount of vacation pay such employee would otherwise have received over and above the wages received for work performed during the vacation period.

(b) To qualify for said vacation, it is necessary that an employee shall have worked a total of fifteen hundred twenty-five (1525) hours in the said year; any time lost, however, because of an industrial accident while employed by this Company to count as part of the qualifying time.

[fol. 25] (d) Employees who have served less than sixty (60) days on the next July 1 after date of employment will receive no vacation pay on that date but on the following July 1 will receive the vacation due in accordance with the above qualifying requirements, plus extra amount due in accordance with hours worked.

(e) In case of lay-off, termination or quitting, employee who has served more than sixty (60) days shall receive pro rata share of vacation.

(f) All vacation pay shall be paid on Friday nearest July 1st, except as outlined in paragraph (d).

B. *Current Facts*

1. The vacation pay

On April 30,[3] in accordance with its provisions, the Union gave Respondent notice terminating the then current contract, and on or about May 16, approximately 348 employees out of a total work force of about 400, went on strike and began picketing. Respondent's plant. All parties concede that the strike was entirely economic in nature.[4] By letters dated July 12, a great number of [fol. 26] the striking employees made demand on the Company for payment of the vacation pay allegedly due them under Article VIII of the aforementioned contract. Respondent admits the receipt of these letters. Except in the instances hereafter noted, which were apparently few in number, none of the striking employees received vacation pay in 1963, although it is admitted that such employees satisfied the conditions therefor, as set forth in the contract. Also under date of July 8, counsel for the Union wrote Respondent's plant manager asking when and where the men could secure the vacation pay allegedly due them under the contract. On July 12, Respondent's counsel replied to that letter taking the position, in substance, that because the Union had canceled the con-

[3] This, and all dates hereafter mentioned are 1963, unless otherwise indicated.

[4] The strike and picketing continued until December 26, at which time it was abandoned unconditionally, and the strikers made application to return to work. In the meantime the Company had replaced a number of the strikers. By July 1, about 259 had been replaced; by August 1, a total of about 325; by September 1, a total of about 339; by October 1, a total of about 442; and all strikers had been replaced by October 8. These so-called "replacements," however, included some strikers who abandoned the strike and returned to work. The number of these does not clearly appear. As a striker was replaced by a new employee, he was notified by the Company of his replacement by a permanent employee. Some of the strikers were rehired by the Company, apparently as new employees, after their replacement. The exact number of these does not appear.

tract, there was no contract in effect providing for the payment of vacation pay.[5]

Stephen Docie, a witness called by Respondent, who was at the time of these events its personnel director, admitted that vacation benefits were paid to all employees who did not strike on May 16 and who met the contract qualifications therefor, and were also paid to those who struck but abandoned the strike and returned to the job [fol. 27] before they had been replaced. The reason assigned by Docie for this was that in the case of the nonstrikers it was company policy to pay vacation benefits to all qualifying employees who were on the job on July 1; and in the case of returning strikers who had not yet been replaced, there was no break in service. Plant Manager Granger testified, however, that the aforesaid payments to nonstrikers and to returning strikers, were not made pursuant to the contract because that had been canceled, but that subsequent to the cancellation it was necessary to have some rules concerning vacation pay, and that Respondent adopted rules which were substantially the same as those in the canceled contract.

2. The alleged independent 8(a)(1) statements

The essential testimony relating to this aspect of the case, offered by both the parties, will be set forth with respect to all of the incidents relied upon by the General Counsel. Credibility issues will be resolved in the concluding findings.

a. *The Vernon Barber incident*

Vernon Barber, a striker since May 16, who had been replaced in June, and who engaged in picketing Respondent, testified that in mid-November, he and W. E. Pierce, also a striker and picket, left the picket line to get lunch at a drive-in about a mile from the plant; at the table they were joined by Arthur Davis, a foreman, and admitted supervisor in Respondent's sheet metal depart-

[5] The General Counsel also adduced some testimony concerning oral demands by some employees for the vacation pay allegedly due them. As this evidence is, for the most part controverted, it will be dealt with in a subsequent portion of this Decision.

ment; that he (Barber) asked Davis how production was going at the plant; that Davis replied it was "pretty bad" and offered Barber and Pierce a better job and more [fol. 28] money than they were making when they went out on strike, if they would return to work at the plant. Barber further testified that neither he nor Pierce had worked under Davis' supervision; that he did not think Davis was hard of hearing; that he did not ask Davis the nature of the job offered by the latter, or what the rate of pay would be. Pierce did not testify, nor is there any explanation for the failure to call him.

Davis, who is 70 years of age, and obviously has a substantial hearing impediment, testified that in obedience to instructions given him by management, he refrained from asking any employee to return to work, or making any promises in that connection; that he frequently had lunch at the drive-in, and on occasions saw many of the strikers there, to all of whom he spoke by a simple hello; that this may have included Barber, but had no specific recollection of seeing him; and denied offering Barber or Pierce a job, or promising them more money.

b. *The Edward Criswell incident*

Edward Criswell, an employee who joined the strike at its inception, testified that about a week after the strike began on May 16, and about a month prior to receiving notice of his replacement by the Company, he and fellow striker Pierce were picketing a temporary employment office which Respondent had established in downtown Savannah, and observed Personnel Manager Docie in the doorway to this employment office; that they approached Docie and he (Criswell) asked Docie for his vacation pay; that Docie replied, in substance, that if Criswell would return to work he would "give me my [fol. 29] vacation pay and more money"; and that he told Docie he would not cross the picket line to return to work. As heretofore pointed out, Pierce did not testify, and the record contains no explanation for the failure to call him.[6]

[6] Elzie West, a witness for the General Counsel, whose testimony will hereafter be more fully detailed, testified that he overheard

c. *The Elzie West incident*

Elzie West, also a striker, at first testified that about a week after the strike began and while picketing the temporary employment office on Congress Street, h overheard Criswell ask Docie about the vacation pay and that Docie replied, "If you will come back you will get your vacation pay." Later in his testimony, West added that Docie also offered "a better job, a supervision job." West also testified that in the conversation between Criswell and Docie, which he (West) had overheard, Docie told Criswell "the same thing that he told me." [7]

d. *The Inman Hagan incident*

Inman Hagan, also a replaced striker, testified that he went to Respondent's personnel office about the first week in August to check on his tools left in the plant when he went on strike; that he asked the receptionist about this and was told to come back after lunch. As he was leaving the personnel office Docie came out of his private office and he (Hagan), asked Docie about the vacation pay; [fol. 30] and that Docie replied, "It was tied up in a labor dispute but if I would come back to work I would get it." [8]

e. *The Robert Hathaway incident*

Robert Hathaway, an employee who went on strike on May 16, testified that on Saturday afternoon of the July 28 weekend, he met Docie at a liquor store on the outskirts of town, and after some preliminary conversation asked the latter if "we were ever going to get our vaca-

---

the conversation between Criswell and Docie on this occasion, and that Criswell was alone.

[7] West does not attribute to Docie, as did Criswell, the statement that a return to the job would also mean "more money."

[8] Hagan admitted that while he had gone to the plant for the purpose of seeing about his tools, he did not return after lunch as he had been told by the receptionist, and has not yet gotten his tools. He also stated that on this occasion Docie did not offer him a better paying job if he returned to work.

tion pay or was we ever going back to work," and that Docie replied, "If you come back to work all matters will be settled, financial and otherwise."

Docie testified that when the strike began, he was instructed by Company Counsel not to solicit any employee to return to work, or to make any promises regarding "fringe benefits or any favoritism"; that he followed these instructions "implicitly." He denied that he had any conversation with Criswell, West, Hagan, or Hathaway regarding vacation pay, as they had testified. Particularly in the case of Hagan and Hathaway, Docie testified that the conversation with them, at the time and place they indicated, was impossible because he was on Santa Belle Island, off the coast of Fort Meyers, Florida, spending his vacation, from July 28 to August 10.

[fol. 31] f. *The Julian Grimes incident*

Julian Grimes, a striking employee, who had worked as a utility man on the assembly line, testified that about September 20, he met James Griner, manager of Respondent's service department, on the street in downtown Savannah, and asked Griner if he had any idea when the men would receive their vacation pay, and that Griner stated, in substance, that those men returning to work had received their vacation pay, and if he (Grimes) would come back to work he would get his vacation pay and "a better paid job." Grimes replied that he would not come back until the picketing had ceased.

Griner denied that any such conversation occurred, saying that Grimes did not work in his department, and he had not talked with him for some 3 or 4 years.

C. *Analysis and concluding findings*

1. The alleged 8(a)(3) violation

Respondent contends that this aspect of the case presents nothing more than an effort on the part of the employees to collect money allegedly due them under the terms of a collective-bargaining agreement. It argues that the employees should be left to their rights under

Section 301 of the Act, which rights, as the Supreme Court has held,[9] may be enforced in either the State or Federal courts. Were this the theory of the General Coun- [fol. 32] sel's case, I would agree with Respondent. "The Board is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific enforcement of its term" (*United Telephone Company of the West*, 112 NLRB 779, 782). To the same effect see *Association of Salaried Employees* v. *Westinghouse, etc.*, *supra*, at 437, footnote 2. The General Counsel's case, however, is premised on a broader base. His theory is that Respondent withheld vacation pay due employees under the contract, because of their membership in and activities on behalf of the Union, and because they engaged in concerted activities for the purposes of collective bargaining and other material aid and protection. If such was Respondent's purpose, the withholding of the vacation pay was plainly discriminatory, and a violation of Section 8(a)(3) and (1) because its natural and foreseeable effect was to discourage membership in the Union cf. *Krambo Food Stores*, 106 NLRB 870, 877, and was simply punishment for engaging in a strike against Respondent, a right protected by Section 7 of the Act. *N.L.R.B.* v. *Washington Aluminum Co*, 370 U.S. 9. The issue, therefore, is factual, namely, whether Respondent withheld the vacation pay for the reason assigned by the General Counsel, or for some other reason or reasons unconnected with union membership or the concerted activities of the employees.

Respondent admits that all employees qualifying for vacation pay under the terms of the contract, and who did not go on strike, received their vacation pay about July 1, when it became payable under the terms of the contract; but not striker received such payment even though he had fulfilled every contractual condition precedent. Its stated reason for pursuing this course was that [fol. 33] the contract had expired and hence imposed no obligation upon it to pay vacation benefits to anyone, and

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[9] See *Textile Workers Union* v. *Lincoln-Mills*, 353 U.S. 448; *Association of Salaried Employees* v. *Westinghouse, etc.*, 348 U.S. 437; *Smith* v. *Evening News Assoc.*, 371 U.S. 195.

that the payment to the nonstrikers was not pursuant to the contract, but pursuant to its unilaterally promulgated rules to pay such benefits to all employees at work on July 1, which unilaterally rules happened to coincide with the provisions of the expired contract. Respondent also admits that it paid vacation pay to each qualifying striker who abandoned the strike and returned to work prior to being permanently replaced, urging that permanently replaced strikers lost their status as "employees," and hence were entitled to no benefits. But these explanations do not withstand scrutiny. Stripped to its essentials, Respondent was in effect saying to all its employees refrain from joining the strike, or having joined it, abandoned the strike and return to work, and you will receive the vacation benefits due, but join or continue adherence to the strike, you will not receive the vacation benefits to which you would otherwise be entitled. Not only was the natural and foreseeable consequence of Respondent's conduct to discourage membership in the Union, but upon the entire record, I find and conclude that Respondent's intent and purpose was to retaliate against the strikers for having engaged in this concerted activity.

2. The alleged independent 8(a)(1) violations

I find the testimony offered by the General Counsel insufficient to establish the incidents above discussed. In short, I credit the testimony of Davis, Docie and Griner, and discredit that of Barber, Criswell, West, Hagan, Hathaway and Grimes. I am persuaded to this conclusion because of the several inconsistencies in the testimony of the General Counsel's witnesses.

[fol. 34] Vernon Barber "did not think" Foreman Davis was hard of hearing. That Davis is hard of hearing was perfectly evident to the undersigned, and if Barber in fact talked with Davis, it must have been perfectly evident to Barber. Also, I am at a loss to understand why Pierce, who allegedly was with Barber on the occasion in question, was not called as a witness, or why his failure to testify was not explained.

Criswell testified that Docie's promise was to give him (Criswell) his "vacation pay and more money." Not only

was Pierce, who allegedly was with Griswell, not called, but General Counsel's witness West, who allegedly overheard the conversation, testified that Docie told Criswell, "the same thing he told me." West at first testified that Docie's statement was simply a promise to give the vacation pay, but later stated that Docie also offered "a better job, a supervision job." Significantly, West did not support Criswell's statement that Docie offered Criswell "more money."

Having credited Docie with respect to the Criswell and West incidents, I also credit him with respect to the Hagan and Hathaway incidents.

With respect to Grimes' incident, it seems most unusual that Griner, a foreman in Respondent's Service Department, would discuss with an employee whom he knew only slightly, and who did not work in his department, a matter solely within the jurisdiction of the personnel department, particularly at a time when virtually all of the strikers had been replaced. Accordingly, I credit Griner.

For the reasons stated, I find and conclude that the [fol. 35] alleged independent Section 8(a)(1) violations have not been established, and will recommend that the allegations of the complaint in that regard be dismissed.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I made the following:

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2) of the Act, and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The union is a labor organization within the meaning of Section 2(5) of the Act.

3. By withholding vacation pay from its employees as set forth in section B 1, above, Respondent engaged in, and is engaging in, unfair labor practices proscribed by Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. It has not been established by a preponderance of the evidence that Respondent solicited employees to aban-

don their strike and return to work, and promised them benefits if they would do so, and that allegation of the complaint should be dismissed.

[fol. 36] The Remedy

Having found that Respondent has engaged in, and is engaging in, unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action found necessary to effectuate the policies of the Act.

Having found that Respondent discriminatorily withheld from certain of its employees vacation pay for which they had qualified under the terms of the contract between Respondent and the Union, it will be required to pay to each such employee the vacation pay so withheld. The amount due to each such employee shall bear interest at the rate of 6 percent per annum from June 28, 1963, the date such vacation pay was payable under provisions of the applicable contract until paid.

It will also be recommended that Respondent shall, upon request, make available to the Board or its agents, for inspection and reproduction, all books and records necessary or helpful in determining the identity of the employee to whom vacation pay is due as herein provided, and in computing the amount thereof.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this case, pursuant to Section 10(c) of the National Labor Relations Act, as amended, I recommend that Respondent Great Dane Trailers, Inc., its officers, agents, successors and assigns, shall:

[fol. 37] 1. Cease and desist from:

(a) Without holding vacation pay from, or in any other manner discriminating against its employees in regard to hire or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them be Section 7 of the Act.

2. Take the following affirmative action which, it has been found, is necessary to effectuate the policies of the Act:

(a) Forthwith pay to each employee on its payroll on May 15, 1963, who qualified for vacation pay under the terms of Article VIII of the agreement between Great Dane Trailers, Inc., and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local No. 26, AFL-CIO, effective April 1, 1960, the vacation pay due on June 28, 1963, as provided in the aforesaid Article VIII; provided, however, that nothing herein shall be construed as requiring the payment of such vacation pay to any employee who has heretofore received such vacation pay for the contract year ending June 30, 1963.

(b) Post at its plant in Savannah, Georgia, copies of the notice attached hereto and marked "Appendix."[10] [fol. 38] Copies of said notice to be furnished by the Regional Director for the Tenth Region of the Board (Atlanta, Georgia), shall after being duly signed by its representative, be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material. A copy of the aforesaid Appendix shall also be mailed by Respondent to each employee on its payroll on May 15, 1963, and who is not presently employed by it, at his or

[10] If this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

her last known address, and to the aforesaid Local No. 26.

(c) Upon request, make available to the Board and its agents, for inspection and reproduction, all books and records necessary or helpful in determining the identity of the employees to whom vacation pay is due as provided herein, and in computing the amount thereof.

(d) Notify the aforesaid Regional Director, in writing, within 20 days from the receipt of this Decision, what steps it has taken to comply herewith.[11]

IT IS FURTHER ORDERED, that paragraphs 13 and [fol. 39] 14 of the complaint herein, as amended at the hearing, be, and the same are, dismissed.

Dated at Washington, D. C.
July 15, 1964.

(Signed) JOSEPH I. NACHMAN
JOSEPH I. NACHMAN
Trial Examiner

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, you are hereby notified that:

WE WILL NOT withhold vacation pay from, or in any other manner discriminate against our employees in regard to hire or tenure of employment, or

[11] In the event that these Recommendations be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps it has taken to comply herewith."

any term or condition of employment, to encourage or discourage membership in any union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist unions, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the pur-
[fol. 40] poses of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL pay to each employee on our payroll on *May 15, 1963, who qualified for vacation pay under* the terms of Article VIII of our contract with Local 26, which became effective April 1, 1960, and who has not heretofore received the same, the vacation pay due June 28, 1963, under the terms of the aforesaid contract.

GREAT DANE TRAILERS, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 528 Peachtree-Seventh Building, 50 Seventh Street, N. E., Atlanta, Georgia 30323 (Tel. No. 876-3311, Ext. 5357), if they have any question concerning this notice or compliance with its provisions.

[fol. 41] BEFORE THE
NATIONAL LABOR RELATIONS BOARD

EXCEPTIONS TO INTERMEDIATE REPORT NO. 392-64
OF THE TRIAL EXAMINER

* * * *

Comes now, Great Dane Trailers, Inc., a corporation, by its undersigned counsel and excepts to Intermediate Report No. 392-64 of the Trial Examiner dated July 15, 1964, and to all adverse findings, conclusions and decisions in said Intermediate Report, and to the adverse "Conclusions of Law", "The Remedy", the "RECOMMENDED ORDER" except for line 27, page 38 through *line 2, page 39 thereof, and the "APPENDIX"* attached to said "RECOMMENDED ORDER".

The Respondent further excepts to the following specific findings, conclusions, decisions, rulings and/or recommendations of the Trial Examiner in said Intermediate Report:

1. Respondent excepts to:

> ". . . although it is admitted that such employees satisfied the conditions therefor, as set forth in the contract," (lines 7-9, page 26)

on the ground that such statement is ambiguous and misleading in that it implies that the contract was still in force, when it is admitted that it was not.

2. Respondent excepts to the first part of the "Analysis and Concluding Findings" which is devoted to "1. The alleged 8(a)(3) violation" thereof (line 20, page 31 —line 26, page 32) on the grounds that said finding is not supported by the evidence, on the record as a whole, is contrary to the evidence, and is wholly erroneous in [fol. 42] that it involves the interpretation of a contract which, therefore, should be made the subject of an action under § 301 of the LMRA, rather than an 8(a)(3) charge. Respondent excepts to this finding by the Trial Examiner that the employer was unlawfully motivated in withholding vacation pay from the *replaced* strikers on the further ground that the Trial Examiner never did find that said replaced strikers *were entitled*, as a matter

of contract *or otherwise to said vacation pay.* This is entirely omitted from the Trial Examiner's Decision.

3. Respondent excepts to:

"Conclusions of Law

* * *

3. By withholding vacation pay from its employees as set forth in section B 1, above, Respondent engaged in, and is engaging in, unfair labor practices proscribed by Section 8(a)(3) and (1) of the Act," (line 10, and 20-23, page 35)

on the same grounds as stated in exception # 2 above.

4. Respondent excepts to:

"The Remedy" and "RECOMMENDED ORDER" (line 1, page 36 — line 10, page 39) except for line 27, page 38 through line 2, page 39, thereof on the grounds that "The Remedy" and "RECOMMENDED ORDER" are based upon the third Conclusion of Law, quoted above, (which is objected to as stated above,) and on the further ground that said "RECOMMENDED ORDER" is [fol. 43] much broader than necessary to afford a complete remedy for the violation found.

5. Respondent excepts to the "APPENDIX" (attached to the Trial Examiner's Decision) on the grounds that it is based on the third Conclusion of Law, which is objected to as above stated.

HAMILTON & BOWDEN
(Signed) DAVID A. BARTHOLF
Attorneys for Respondent

Address of Counsel:
1056 Hendricks Avenue
Jacksonville, Florida

[Certificate of Service (omitted in printing)]

[fol. 44] BEFORE THE
NATIONAL LABOR RELATIONS BOARD

AMENDED EXCEPTIONS TO DECISION AND REPORT
NO. 392-64 OF THE TRIAL EXAMINER

* * * *

Comes now, Great Dane Trailers, Inc., a corporation, by its undersigned counsel and excepts to the Decision Number 392-64 of the Trial Examiner dated July 15, 1964, and to all adverse findings, conclusions and decisions in said Intermediate Report, and to the adverse "Conclusions of Law", "The Remedy", the "RECOMMENDED ORDER" except for line 27, page 38 through line 2, page 39 thereof, and the "APPENDIX" attached to said "RECOMMENDED ORDER".

The Respondent further excepts to the following specific findings, conclusions, decisions, rulings and/or recommendations of the Trial Examiner in said Intermediate Report:

[fol. 45] 1. Respondent excepts to:

> ". . . although it is admitted that such employees satisfied the conditions therefor, as set forth in the contract," (lines 7-9, page 26)

on the ground that such statement is ambiguous and misleading in that it implies that the contract was still in force, when it is admitted that it was not.

2. Respondent excepts to:

> "C. *Analysis and concluding findings*
>
> 1. The alleged 8(a)(3) violation
>
> Respondent contends that this aspect of the case presents nothing more than an effort on the part of the employees to collect money allegedly due them under the terms of a collective-bargaining agreement. It argues that the employees should be left to their rights under "Section 301 of the Act, which rights, as the Supreme Court has held, [footnote omitted] may be enforced in either the State or Federal courts. Were this the theory of the General

Counsel's case, I would agree with Respondent. 'The Board is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific enforcement of its terms' (*United Telephone Company of the West*, 112 NLRB 779, 782). To the same effect see *Association of Salaried Employees* v. *Westinghouse, etc., supra*, at 437, footnote 2. The General Counsel's case, however, is premised on a
[fol. 46] broader base. His theory is that Respondent withheld vacation pay due employees under the contract, because of their membership in and activities on behalf of the Union, and because they engaged in concerted activities for the purposes of collective bargaining and other material aid and protection. If such was Respondent's purpose, the withholding of the vacation pay was plainly discriminatory, and a violation of Section 8(a)(3) and (1) because its natural and foreseeable effect was to discourage membership in the Union cf. *Krambo Food Stores*, 106 NLRB 870, 877, and was simply punishment for engaging in a strike against Respondent, a right protected by Section 7 of the Act. *N.L.R.B.* v. *Washington Aluminum Co*, 379 U S 9. The issue, therefore, is factual, namely, whether Respondent withheld the vacation pay for the reason assigned by the General Counsel, or for some other reason or reasons unconnected with union membership or the concerted activities of the employees.

Respondent admits that all employees qualifying for vacation pay under the terms of the contract, and who did not go on strike, received their vacation pay about July 1, when it became payable under the terms of the contract; but no striker received such payment even though he had fulfilled every contractual condition precedent. Its stated reason for pursuing this course was that the contract had expired and hence imposed no obligation upon it to pay vacation benefits to anyone, and that the payment
[fol. 47] to the nonstrikers was not pursuant to the contract, but pursuant to its unilaterally promulgated rules to pay such benefits to all employees at work on July 1, which unilaterally [sic] rules happened

to coincide with the provisions of the expired contract. Respondent also admits that it paid vacation pay to each qualifying striker who abandoned the strike and returned to work prior to being permanently replaced, urging that permanently replaced strikers lost their status as "employees," and hence were entitled to no benefits. But these explanations do not withstand scrutiny. Stripped to its essentials, Respondent was in effect saying to all its employees refrain from joining the strike, or having joined it, abandoned [sic] the strike and return to work, and you will receive the vacation benefits due, but join or continue adherence to the strike, you will not receive the vacation benefits to which your would otherwise be entitled. Not only was the natural and forseeable consequence of Respondent's conduct to discourage membership in the Union, but upon the entire record, I find and conclude that Respondent's intent and purpose was to retaliate against the strikers for having engaged in this concerted activity."

on the grounds that said finding is not supported by the evidence, on the record as a whole, is contrary to the evidence, and is wholly erroneous in that it involves the interpretation of a contract, therefore, which should be made the subject of an action under § 301 of the LMRA, rather than an 8(a)(3) charge. Respondent excepts to [fol. 48] this finding by the Trial Examiner that the employer was unlawfully motivated in withholding vacation pay from the *replaced* strikers on further ground that the Trial Examiner never did find that said replaced strikers were entitled, as a matter of contract or otherwise, to said vacation pay. This is entirely omitted from the Trial Examiners Decision.

3. Respondent excepts to:

"Conclusions of Law

* * *

3. By withholding vacation pay from its employees as set forth in section B 1, above, Respondent engaged in, and is engaging in, unfair labor practices

proscribed by Section 8(a)(3) and (1) of the Act," (line 10, and 20-23, page 35)

on the same grounds as stated in exception # 2 above.

4. Respondent excepts to:

"The Remedy"

Having found that Respondent has engaged in, and is engaging in, unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action found necessary to effectuate the policies of the Act.

Having found that Respondent discriminatorily withheld from certain of its employees vacation pay for which they had qualified under the terms of the [fol. 49] contract between Respondent and the Union, it will be required to pay to each such employee the vacation pay so withheld. The amount due to each such employee shall bear interest at the rate of 6 percent, per annum from June 28, 1963, the date such vacation pay was payable under provisions of the applicable contract until paid.

It will also be recommended that Respondent shall, upon request, make available to the Board or its agents, for inspection and reproduction, all books and records necessary or helpful in determining the identity of the employees to whom vacation pay is due as herein provided, and in computing the amount thereof.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this case, pursuant to Section 10(c) of the National Labor Relations Act, as amended, I recommend that Respondent Great Dane Trailers, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Withholding vacation pay from, or in any other manner discriminating against its employees in regard to hire or tenure of "employment, or any

term or condition of employment, to encourage or discourage membership in any labor organization.

[fol. 50] (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them be Section 7 of the Act.

2. Take the following affirmative action which, it has been found, is necessary to effectuate the policies of the Act:

(a) Forthwith pay to each employees on its payroll on May 15, 1963, who qualified for vacation pay under the terms of Article VIII of the agreement between Great Dane Trailers, Inc., and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local No. 26, AFL-CIO, effective April 1, 1960, the vacation pay due on June 28, 1963, as provided in the aforesaid Article VIII; provided, however, that nothing herein shall be construed as requiring the payment of such vacation pay to any employee who has heretofore received such vacation pay for the contract year ending June 30, 1963.

(b) Post at its plant in Savannah, Georgia, copies of the notice attached hereto and marked "Appendix." (footnote omitted) Copies of said notice to be furnished by the Regional Director for the Tenth Region of the Board (Atlanta, Georgia), shall, after being duly signed by its representative, be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reason-

[fol. 51] able steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material. A copy of the aforesaid Appendix shall also be mailed by Respondent to each employee on its payroll on May 15, 1963, and who is not presently employed by it, at his or her last known address, and to the aforesaid Local No. 26.

(c) Upon request, make available to the Board and its agents, for inspection and reproduction, all

books and records necessary or helpful in determining the identity of the employees to whom vacation pay is due as provided herein, and in computing the amount thereof.

(d) Notify the aforesaid Regional Director, in writing, within 20 days from the receipt of this Decision, what steps it has taken to comply herewith.

[footnote omitted]

* * *

Dated at Washington, D. C. July 15, 1964.

JOSEPH I. NACHMAN
Trial Examiner

on the grounds that "The Remedy" and "RECOMMENDED ORDER" are based upon the third Conclusion of law, quoted above, (which is objected to as stated above,) [fol. 52] and on the further ground that said "RECOMMENDED ORDER" is much broader than necessary to afford a complete remedy for the violation found.

5. Respondent excepts to:

"APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
THE RECOMMENDATIONS OF A
TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, you are hereby notified that:

WE WILL NOT withhold vacation pay from, or in any other manner discriminate against our employees in regard to hire or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form,

join, or assist unions, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL pay to each employee on our payroll on
[fol. 53] May 15, 1963, who qualified for vacation pay under the terms of Article VIII of our contract with Local 26, which became effective April 1, 1960, and who has not heretofore received the same, the vacation pay due June 28, 1963, under the terms of the aforesaid contract.

GREAT DANE TRAILERS, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 528 Peachtree-Seventh Building, 50 Seventh Street, N. E., Atlanta, Georgia 30323 (Tel. No. 876-3311, Ext. 5357), if they have any question concerning this notice or compliance with its provisions."

on the grounds that is based on the third Conclusion of Law, which is objected to as stated above.

6. Respondent excepts to the failure of the Trial Examiner to allow Respondent to inquire whether or not one of the witnesses was under indictment for any crime at the time of the testimony (Tr. 21, line 21 through Tr. 22, line 23), on the ground that it is a basic rule of administrative law that evidence which would be technically inadmissable in a court proceeding can be admitted in an [fol. 54] administrative hearing for whatever value it may have under the theory that the hearing officer, being better trained and more intelligent than a jury, can distinguish between relevant and irrelevant testimonies and give proper weight and value to any border line testimony.

7. Respondent excepts to the Trial Examiner's allowing Counsel for the General Counsel to amend the Complaint at the hearing, over Respondent's objection, and without giving Respondent the time required by the rules to compose an Answer thereto. (Tr. 69, line 12 through Tr. 71, line 2) Rules and Regulations, National Labor Relations Board, as amended, Section 102.20.

8. Respondent excepts to the Trial Examiner's allowing hearsay testimony to be admitted over his objection (Tr. 80, line 18 through Tr. 81, line 14), while later disallowing the same testimony (Tr. 82, line 19 through Tr. 83, line 21).

9. Respondent excepts to the Trial Examiner's allowing Counsel for the General Counsel to amend the Complaint at the hearing on the same grounds and for the same reasons as alleged in exception # 7 above. (Tr. 84, line 14 through Tr. 85, line 14)

10. Respondent excepts to the Trial Examiner's sustaining the objection to Respondent's question "Have you ever been convicted of a crime?" (Tr. 90, line 24)

11. Respondent excepts to the refusal of the Trial Examiner to grant Respondent's Motion to Strike irrelevant testimony. (Tr. 93, line 11 through Tr 94, line 8).

[fol. 55] 12. Respondent further excepts to the entire conduct of the hearing by this Trial Examiner and all of the above adverse rulings on the ground that this Trial Examiner was prejudiced against the Respondent and against Respondent's Counsel, as more clearly appears from the abrupt and curt manner in which Respondent's Counsel was cut-off and in effect told to shut up on several instances when Respondent's Counsel was merely attempting to be helpful to the Trial Examiner. (Tr. 6, line 4 and Tr. 26, line 19)

HAMILTON & BOWDEN
(Signed) DAVID A. BARTHOLF
Attorneys for Respondent

Address of Counsel:
Hamilton & Bowden
1056 Hendricks Avenue
Jacksonville, Florida

[Certificate of Service (omitted in printing)]

[fol. 56] BEFORE THE
NATIONAL LABOR RELATIONS BOARD

150 NLRB No. 55

D-6716
Savannah, Georgia

DECISION AND ORDER—December 16, 1964

* * * *

On July 15, 1964, Trial Examiner Joseph I. Nachman issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Decision attached hereto. The Trial Examiner also found that the Respondent had not engaged in other unfair labor practices alleged in the complaint. Thereafter, the Respondent filed exceptions to the Decision and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

[fol. 57] The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed.[1] The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Trial Examiner's Decision and the exceptions and brief, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations with the following additional comments.

We agree with the Trial Examiner that the denial of vacation pay to strikers who had not abandoned the strike by July 1, 1963, unlawfully discriminated against them because of their adherence to the Union's strike. Whether vacation pay was granted to those employees who were

[1] Respondent took exception to certain rulings of the Trial Examiner made at the hearing with respect to testimony relating to the independent violations of Section 8(a)(1) alleged in the complaint. In view of the Trial Examiner's dismissal of these allegations, to which the General Counsel has not excepted, it is apparent that no prejudice to the Respondent has resulted from such rulings.

actually working on July 1, pursuant to the provisions of the expired contract, or was granted, as the Employer contends, as a unilaterally adopted policy formulated after the expiration of the contract, is immaterial. Any striker who had not yet been permanently replaced was entitled, as an employee under Section 2(3) of the Act, to be treated in the same fashion as other employees. And even those strikers who had been permanently replaced before the date of payment of vacation benefits were entitled to a pro-rata share, either under Article VIII(e) of the expired contract, or under the unilateral policy of the Employer which admittedly adopted substantially the same provisions on eligibility.

[fol. 58] We are not hereby interpreting the contract for the parties, as the Employer contends, but are only holding that strikers must be treated uniformly with non-strikers with respect to whatever benefits accrue to the latter from the existence of the employment relationship.[2] Whatever problems may arise as to specific amounts due, or as to status, may be resolved at the compliance

As for the Employer's contention that an action for the payment of vacation benefits may only be brought under Section 301 of the Labor-Management Relations Act, our previous discussion and the Trial Examiner's Decision indicate that the Board's power to order reimbursement of vacation benefits to the strikers is based on the need to remedy the unfair labor practice committed, and not on their contractual rights, whatever they may be. The Board's jurisdiction to remedy unfair labor practices is not preempted by the possible existence of a contractual obligation arising from the same circumstances.[3]

---

[2] Cf. *General Electric Company*, 80 NLRB 510, where the accrual of *future* vacation benefits, based on the performance of services or its equivalent, was allowed to non-strikers but disallowed for strikers. Here, on the other hand, we are not awarding vacation pay to the strikers based on any period in which they were on strike, but are rather adopting the same eligibility requirements, such as total hours worked in the preceding year, as the Employer imposed on the non-strikers.

[3] See *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U. S. 95, footnote 9.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board hereby adopts as its Order, the Order recommended by the Trial Examiner, [fol. 59] and orders that Great Dane Trailers, Inc., Savannah, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C. Dec. 16, 1964.

FRANK W. MCCULLOCH,
Chairman

BOYD LEEDOM, Member
HOWARD JENKINS, JR.,

HOWARD JENKINS, JR. Member
National Labor
Relations Board

[SEAL]

[fol. 63] BEFORE THE
NATIONAL LABOR RELATIONS BOARD
TENTH REGION

Case No. 10-CA-5518

In the matter of:

GREAT DANE TRAILERS, INC.
and
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS BLACKSMITHS, FORGERS AND HELPERS LOCAL NO. 26, AFL-CIO

Room 311, U. S. Post Office and Courthouse,
Savannah, Georgia

TRANSCRIPT OF HEARING—May 19, 1964

Pursuant to notice the above-entitled matter came on for hearing at 10:00 o'clock a.m.

BEFORE:

JOSEPH I. NACHMAN, Trial Examiner.

APPEARANCES:

O. R. T. BOWDEN, ESQ.
Messrs. Hamilton and Bowden,
1056 Hendricks Avenue,
Jacksonville, Florida

appearing on behalf of Great Dane Trailers, Inc., the Respondent.

[fol. 64] T. R. SOBIESKI, ESQ.
Tenth Region, National Labor Relations Board,
50 - 7th St.
Atlanta, Georgia,
appearing for General Counsel.

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PROCEEDINGS

TRIAL EXAMINER NACHMAN: The hearing will be in order.

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COLLOQUY BETWEEN TRIAL EXAMINER AND COUNSEL

TRIAL EXAMINER: Before you do that suppose—let's have an opening statement.

MR. SOBIESKI: General Counsel intends to prove that Respondent's employees on or about May 17, 1963 went out on a strike.

TRIAL EXAMINER: Is there an issue as to whether it was economic or unfair?

MR. SOBIESKI: It is economic. This is not an issue in this case.

Of course the strike was preceded by a lengthy collective bargaining negotiations which did not result in an agreement, therefore the union felt they should strike, which they did.

[fol. 65] TRIAL EXAMINER: Strike to enforce plans?

MR. SOBIESKI: Yes, sir, and we intend to prove that during the course of the strike that various employees on strike asked supervisors for the Respondent for vacation pay. They were told that if they came back in off the strike they would get vacation pay. Also, we intend to prove that some of the people who engaged in the strike later returned to the company and received vacation pay. I think the pleadings set out that the people that did not strike did receive vacation pay. It is General Counsel's contention, based on the contract, these people are due the pay, however they have not received it.

TRIAL EXAMINER: Is there an issue before me that I have to interpret the meaning of the contract?

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MR. SOBIESKI: I would say that would be something that the Trial Examiner would have to interpret based on case law, also upon simple inference and justifiable inference that the people did not receive the vacation pay because they did engage in collective, concerted activity.

TRIAL EXAMINER: Are you arguing both points or one point, and if so, which?

MR. SOBIESKI: We are arguing both, sir. That the [fol. 66] contract specifies vacation pay is due, however they did not get it and the Labor Board has issued a complaint charging a violation of Section 8(3) based on the fact that they were not paid the vacation pay.

TRIAL EXAMINER: The matter of contract interpretation is a matter the Board generally does not pass on.

MR. SOBIESKI: Sir. I would say generally speaking you are correct, however,—

TRIAL EXAMINER: That would be suit for monies due, wouldn't it?

* * * *

MR. SOBIESKI: That is, however, we have to mention the fact that the contract exists and there was a provision of vacation pay.

TRIAL EXAMINER: Would your position be the same if there were no contract if the company as a matter of practice over a long period of time had—

MR. SOBIESKI: Yes, sir, except it would be a lot tougher to prove. Here we have it in writing and it is a little easier. Just based on past practices we could get into quite a match.

* * * *

[fol. 67] MR. BOWDEN: It is the position of the Respondent that the 8(a)(3) portion of this case involves the payment of vacation pay; the union, in a unilateral action, cancelled the agreement between Respondent and the Union on April 30th, 1963. Thereafter there was no contract in existence between the parties declaring the payment of any vacation pay thereafter.

TRIAL EXAMINER: Let me interrupt a moment. It is your position that there was a contract in effect calling for payment of vacation benefits and that contract was terminated by the union.

MR. BOWDEN: Terminated by the union.

TRIAL EXAMINER: By who ever, there is no obligation on the company to pay it.

MR. BOWDEN: That is right.

TRAIL EXAMINER: Continue.

MR. BOWDEN: The 8(a)(3) portion of this case is a matter of legal interpretation which should be instituted under Section 301 of Labor-Management Relations Act rather than litigated under the provisions of Section 8(a)(3). General Counsel would involve the Trial Examiner [fol. 68] in contract interpretation which would not be remedial in nature but instead would be in the nature of a penalty, alleged violation cognizable by the National Labor Relations Board are separate and apart from the alleged right purportedly arising from the contract. The Respondent contends that this forum is not the proper place to raise the question of vacation pay allegedly due under a contract cancelled by the Union which represented the employees.

TRIAL EXAMINER: I am inclined to agree with you, Mr. Bowden. The Labor Board does not sit as a collection agency.

What have you got to say on the other point that counsel takes? That these payments were withheld as a matter of retaliation against the employees because they went on a strike and therein lies discrimination?

MR. BOWDEN: The answer answers it. We had no contract and therefore we were not under any obligation at all to pay people who were not working.

TRIAL EXAMINER: Assume with me for a moment that you had no contract provision requiring you to pay, as a matter of practice you had done so for years and years. Let's assume I should find upon the evidence that these payments in this particular instance were withheld because employees went on strike. I take it you would agree that that would be an unfair labor practice?

MR. BOWDEN: No. That is a right that arises only [fol. 69] under a contract. This vacation, where they got any or anything else, where you had no contract I don't think that this court—that this hearing can say you should have paid under the contract whether you had one or not.

TRIAL EXAMINER: Assuming that there was no contract but this is a practice which had been going on for years.

MR. BOWDEN: I think my answer would be the same.

TRIAL EXAMINER: There would be no discrimination? That it was withheld because the employees went on strike?

MR. BOWDEN: That is right. On the cases I have found on this I find that none have been adjudicated by the National Labor Relations Board, there are many cases, of course, under Section 301 of the Act, on these fringes even before a strike and during a strike. The fact of the matter is I was interested in seeing a survey conducted and I can read you just briefly, and it might be appropriate at this time, on strike situations where the contract expires and the union strikes for a new contract, and I am reading from LRX Bureau of National Affairs, on vacations 52 companies did not permit the strikers to collect vacation pay while 34 companies paid under various circumstances, that is, they set a new vacation schedule where there might have been two and three weeks, they paid one, etc., but it shows there is no clear law even under Section 301 about the operation of fringes under the conclusion of a contract. I say that this court, [fol. 70] even if they found these allegations to be true, would require a company to post a notice, following the 8(a)(1) part of this case but they could not, in our opinion, interpret the contract or find that this company would be required to pay the strikers simply because some of them in the plant got paid, or require the payment of others on the same basis. In the first place, and I am assuming a different vacation schedule for those who had been there for one year and those who had been there for five, determine the amount of hours they should work to qualify and all of these other attendant matters that go into figuring vacation, all these things you would have to find.

TRIAL EXAMINER: Let me iron out one other thing. Would you agree that had this contract been in effect, had not been terminated, these employees would have been entitled to vacation pay?

MR. BOWDEN: If the contract had been in effect and they had otherwise qualified I think we would have been required to pay it, yes, sir.

TRIAL EXAMINER: I haven't read the contract provision yet. Let me look at that first.

MR. BOWDEN: It requires your interpretation of this contract and I think that is where it is not appropriate in this proceeding. If I may add, Your Honor, I don't know why this particular fringe was selected be-
[fol. 71] cause this contract like all contracts has paid holidays, they have all the other things and these people apparently didn't feel like they had an enforceable contract on these others because they are not mentioned. Now, just why vacations were not—why this one item, vacations were selected out of the many is a little bit strange to me but in any event it is our position that if these people had a contract, they had a remedy, they had a grievance procedure and of course they have 301 suits for collection. We have put the union, through its legal representatives, on notice of our position as far as—as far back as a year ago through correspondence that we will introduce. This vacation pay was not mentioned then in any bargaining session even though the union was cognizant of it all the time. We feel if they have a right it is a proper matter for a 301 suit.

TRIAL EXAMINER: All right. You may proceed.

VERNON BARBER

was called as a witness by and on behalf of General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Sobieski)

* * * *

Q Will you tell me whether you ever worked for Great Dane, Mr. Barber? A Yes, I did.

[fol. 72] Q I will ask you when you worked there? A I went there in April of '57, I think.

Q What was your job? A Material expeditor and crane operation.

Q How long did you stay there? A I stayed there until May the 16th, 1963.

Q What happened on May 16th, 1963? A The Boilermakers' Union went on strike.

EXAMINER NACHMAN: And you went out on strike?

THE WITNESS: Yes, sir, that is right.

Q (By Mr. Sobieski) What happened during the strike, if anything, to let you know whether you had a job or didn't have a job? A The Company sent me a letter saying that I was replaced on my job, therefore, discharged.

Q Do you remember when the letter was sent to you, sir? A In June.

Q In 1963? A Yes, sir.

* * * *

Q (continued) what happened with regard to vacation pay, now I am talking about you. What happened to you, the past practice. A I always got my vacation pay.

EXAMINER NACHMAN: Every year?

THE WITNESS: Every year. Every year around the first of July.

[fol. 73] Q (By Mr. Sobieski) Did you get any vacation pay in 1963? A No, sir.

Q What attempts, if any, have you made to get this vacation pay? A I signed the letter along with the rest of the people that was on strike and it was sent to the company, asking for my vacation pay.

Q I hand you what is marked General Counsel's Exhibit 3, could you tell us what this is?

(The document above referred to was marked General Counsel's No. 3 for identification.)

A Yes, sir, this is the letter we signed asking for our vacation pay.

Q Did you sign one of these, Mr. Barber? A Yes, sir, I did.

* * * *

TRIAL EXAMINER: If I understand you, Mr. Barber, the man from the Union office gave you a form letter which you signed and that is all you know about it?

THE WITNESS: That is right.

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HENRY HARDEN

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

[fol. 74] DIRECT EXAMINATION

Q (By Mr. Sobieski) State your name for the record, sir? A Henry Harden.

Q Will you tell us what your connection is with this case? A Business Manager for Boilermakers, Local 26.

Q Are you familiar with the strike that took place on May 16th, 1963? A Yes, sir.

* * * *

Q Did you have anything to do, besides this letter, with the strike? A Yes, sir.

Q Would you tell us what? A Well, there was a series of negotiating meetings—

TRIAL EXAMINER: You were trying to get a new contract?

THE WITNESS: Yes, we were in the process of negotiating a new contract.

Q (By Mr. Sobieski) Are you familiar with the recently expired contract, General Counsel's Exhibit No. 2? A Yes, sir.

* * * *

TRIAL EXAMINER: The contract was terminated?

THE WITNESS: Yes, sir.

[fol. 75] TRIAL EXAMINER: When was it terminated?

THE WITNESS: We ran the 45-day extension and it was June 16th—May 16th, midnight, I am sorry.

* * * *

Q (By Mr. Sobieski) Mr. Harden did you have anything to do with attempts by the employees to get their vacation pay? A Yes, sir.

Q Will you tell us what you did? A We wrote a form letter and had the people sign them and we mailed them to Great Dane by registered mail, return receipt requested.

Q Do you have any idea how many people signed these form letters? A I would—it would have to be a guess, I would say approximately 300.

Q I show you what has been marked as General Counsel's Exhibit No. 3, could you tell us what that is? A Yes, sir, I recognize that as the letter.

Q Is that the form letter that he striking employees signed, sir? A Yes, sir.

TRIAL EXAMINER: Excuse me. They didn't all sign this one piece of paper, each would sign a separate one?

THE WITNESS: Each one signed a separate one.

Q (By Mr. Sobieski) After a man signed one was it turned over to you? A They were turned over to me and were in turn mailed to Great Dane Trailers.

[fol. 76] Q Did you personally mail them, sir? A No, my secretary did.

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EDWARD D. CRISWELL

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Sobieski) State your name for the record. A Edward D. Criswell.

Q Will you tell us whether or not you ever worked for Great Dane? A Yes, sir.

Q Could you tell us when? A I started August '54 to December '62 and I went back in January of '63.

Q When did you last work? A May 16.

Q What happened at that time? A We called a strike.

TRIAL EXAMINER: You went out on strike.

Q (By Mr. Sobieski) Did you receive a notice that said you no longer worked for the company? A I got a letter from the company that I had been replaced by a permanent employee, that I had failed to report to work.

Q Do you remember when you got that letter, sir? A About a month and a half after the strike.

[fol. 77] TRIAL EXAMINER: Towards the end of June?

THE WITNESS: That is right.

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TRIAL EXAMINER: In other words, what experience did you have?

THE WITNESS: About the vacation pay, we got vacation pay around the first of July, but if the week runs into July we finish out the week and it would be maybe the second or third of July.

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CROSS EXAMINATION

Q (By Mr. Bowden)

* * * *

Q This conversation that you had with Mr. Docie, you said it was about a week after the strike started? A Yeah.

* * * *

Q At that time you had not been replaced had you? A No, I hadn't.

[fol. 78] Q Did—why did you get into that conversation with Mr. Docie about vacation pay if you had not been replaced and it was not July 1st, the normal time for you to receive vacation pay? How did you get into a discussion with him about vacation pay? A Well, I just thought I would ask him for my vacation pay.

Q Why? A I wanted it.

Q Why did you feel like you were entitled to it at that time? A Well, I know I wasn't entitled to it, but I just asked him for it.

Q Just asked him for it, no reason particularly. A No.

Q Even under past practices you were not entitled to it at that time. A No. Not until July.

Q This was just something extra that you decided to ask for, is that it? When you saw him that day? A Uh-huh.

TRIAL EXAMINER: It was normally paid around July the 1st, wasn't it?

THE WITNESS: Yes, sir.

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JULIAN C. GRIMES

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Sobieski) State your name. A Julian C. Grimes.

[fol. 79] Q Tell the hearing whether or not you ever worked for Great Dane, Mr. Grimes. A Yes, sir, I went out there 10-29-47.

Q How long did you work from that time? A Until we come out on strike on the 16th of May in '63.

Q What was you job at that time? A Utilityman.

Q Were you ever made aware that you were no longer an employee of Great Dane? A No, sir.

Q Did you receive a letter? A No, sir, I did not.

Q While you were working at Great Dane since 1947 in regards to you yourself would you tell us what the vacation policy was? A Well, it had always been paid around the first and Fourth of July, 'requiring' to our contracts.

Q Have you received vacation pay in past years, not counting '63, and you always got it around July 1st? A Yes, sir.

* * * *

ELZIE WEST

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Sobieski) State your name. A Elzie West.

Q Tell us whether or not you have worked at Great Dane, Mr. West? A Yes, I have.

Q Tell us when you began? A It was in July of 1951.

[fol. 80] Q What job did you have, sir? A I started out there as a helper and worked my way to mechanic.

Q How long did you work? When was the last time you worked at Great Dane. A When the strike occurred in '63, the 16th of June.

Q Are you sure it was June? A No, May. May the 16th.

Q Did you go out on strike at that time, Mr. West? A Yes, I did.

Q Were you ever notified that you no longer had a job at Great Dane? A Yes, I was notified by letter.

Q Do you remember when you received that letter? A It was about a week after we was out on strike.

Q You have testified that you worked at Great Dane since 1951, with regards to you yourself, would you tell the hearing what the vacation policy was? A Well, I was paid it prior to the Fourth of July, around the Fourth and the 1st.

Q Did you receive any vacation pay at that time during those years? A Yes, I did.

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Q While on strike did you ever make any other efforts to get your vacation pay? A No, sir.

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CROSS EXAMINATION

Q (By Mr. Bowden) Mr. West, when did you say you normally received your vacation? A Around the first of July.

[fol. 81] Q When was this conversation with Mr. Docie? A It was about a week after we was out on strike.

Q When would—where would that have been? A Up here on Congress Street.

Q When would that have been now? A I would say about the 20th, somewhere along in there.

Q Of May? A Uh-huh.

* * * *

Q But under past practices you were not entitled to get it until July were you? A Yeah, I reckon so.

Q You reckon so, that is right, there is no reckoning about it, is there. When did you get your letter telling you that you had been discharged or replaced? A Uh—I don't remember the exact date. It was during that same week.

Q The same week? A Uh-huh.

TRIAL EXAMINER: Did you get the letter first or did you have this conversation first?

THE WITNESS: I think I had received my letter first.

* * * *

Q Did you say you always got it in July? A Yeah.

Q Why was it due to you in May? A Well, it wasn't due to me in May.

Q It wasn't? A Uh-huh.

[fol. 82] Q It was due to you in July, wasn't it? A That's right.

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INMAN D. HAGAN

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Sobieski) Sate your name for the record? A Inman D. Hagan.

TRIAL EXAMINER: Just a minute, please. Pretend there is a man sitting back there on the back row and you talk loud enough for him to hear you.

(By Mr. Sobieski) Mr. Hagan, will you tell the hearing whether or not you ever worked for Great Dane? A Yes, sir, I worked out there from May of '59 to '63.

Q What happened in 1963 that you are not working there anymore? A The Union went out on a strike.

Q Are you one of the strikers? A Yes, sir, I am.

Q How do—how did you know that you don't have a job at Great Dane anymore? A They sent me a slip saying that I was discharged.

Q Do you remember when you got that? A No, sir, I am not sure when I got it.

Q What month in relation to the strike? A It must have been about August.

Q While you were working at Great Dane before the strike in '63 in regards to yourself what was the vacation policy? A Around the first of July.

[fol. 83] Q What happened around the first of July? A They gave us vacation checks.

Q Now in 1963 did you get any vacation check? A No, sir, I didn't.

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MR. SOBIESKI: Mr. Bowden, General Counsel at this time would like to make a stipulation to the effect that Witness Hattaway, Robert E. Hattaway, J. R. Collins, J. F. Pearson and Charles Youman would all testify that they executed General Counsel's Exhibit No. 3, turned it over to the Union Officer in charge, Mr. Harden, in July, asking for their vacation pay.

TRIAL EXAMINER: In the month of July?

MR. SOBIESKI: Yes, it is dated. The month of July, 1963 and in regards to their employment all of those named worked at Great Dane at least three years if not more and had participated in the vacation policy in existence at the plant, having received vacation checks in the years they worked prior to the 1963 strike.

TRIAL EXAMINER: I think your stipulation should go a step further, that they never received answers to the letter and never received vacation pay for 1963.

MR. SOBIESKI: Yes, sir, and I will so add.

[fol. 84] MR. BOWDEN: I will accept his statement as to what they would testify.

TRIAL EXAMINER: You are stipulating that if the witnesses were called they would so testify?

MR. BOWDEN: I am not saying it is true, I am saying they would testify.

TRIAL EXAMINER: Would that conclude all the testimony that you are going to offer on that point?

MR. SOBIESKI: On that point, yes, sir. I will use these witnesses and get right to the point.

ROBERT HATTAWAY

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

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CROSS EXAMINATION

Q (By Mr. Bowden) Mr. Hattaway, had you been discharged, replaced and discharged on this date, July 28th, 1963? A I can't be sure of the exact date.

Q It could have been after that? A It could've been.

[fol. 85] Q Well, being replaced and discharged was pretty important to you at that time in the month of July. A That it was.

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CHARLES F. YOUMENS

was called as a witness by and on behalf of General Counsel and, having been first duly sworn, was examined and testified as follows:

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CROSS EXAMINATION

Q (By Mr. Bowden) When were you discharged? A Well, just like I said, within probably ten days. Within the ten day period after May the 16th I am sure, but I am not sure of the exact date.

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ARTHUR DAVIS

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Bowden) What is your name, sir? A My name is Arthur Davis.

Q Where are you employed, Mr. Davis? A Do what?

Q Where are you employed? A Great Dane Trailers.

[fol. 86] Q What is your job there? A Oh, I am one of the old foremen out there.

* * * *

Q At the time of the strike did you receive any instructions from the company about the way to conduct yourself during the strike? A Well, we went through one strike out there and on this last strike I received all kinds of instructions from you and the management as to the proper way to conduct yourself and I tried to carry that out to the letter.

Q What were you told? A I was told not to ask any of the employees to come back to work, one of the first things; not to be in contact with them no more than possible and not to promise them anything, that all of that would be handled through the personnel and through you and the management.

Q Did you follow your instructions? A Yes, sir.

* * * *

JAMES A. GRINER

was called as a witness by and on behalf of Respondent and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Bowden) What is your name and address, please? A James A. Griner, 27 Noble Grand Drive, Savannah, Georgia.

[fol. 87] Q What is your position with Great Dane? A Service Manager.

Q How long have you had that position? A Since November 1946.

Q Mr. Griner, did you hold that job and were you in the plant during the period of time last year when the union was out on strike? A I was.

Q Did you and the other supervisors to your knowledge receive any instructions on how to conduct yourself during a strike? A We certainly did.

Q Would you tell us briefly what those instructions were? A We were instructed to conduct ourselves in a manner as not to contact any of the employees that were out on strike or have any conversations, if any questions were asked they were to be referred to the personnel department.

Q Did you do that? A I did that.

* * * * *

STEPHEN M. DOCIE

was called as a witness by and on behalf of Respondent and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Bowden) State your name and address? A Stephen M. Docie, 109 Windsor Road.

Q Where are you employed? A Unemployed currently.

[fol. 88] Q I see. Where were you formerly employed? A Great Dane Trailers.

What was your position with Great Dane during 1963? A I was the Personnel Director.

Q Were you present during 1963 at all the bargaining sessions between the company and the union? A Yes, sir, I was.

Q Do you recall when the strike was called by sion, bringing up the question of vacation pay, either before or after the strike? A No, I do not.

Q Did they? A No.

Q Do you recall when the strike was called by the union? A Midnight May—well, it was the 16th of May.

Q 1963? A 1963.

Q After the strike was called what steps did you take to recruit employees to replace strikers? A First of all I rented an office on Congress Street.

Q Was that street level building? A It was not an office, it was a store and we put furniture in there and telephones.

Q How long did you stay at that address? A Approximately one week, and then we rented another office in a realty building which was not on street level.

Q So you were only at the Congress Street address actually recruiting for about a week after the strike, from about the 17th to the 24th? A That is correct.

Q At the time of the strike or immediately before the strike did you receive any instructions on how to conduct yourself during a strike as a supervisor? A Yes. I [fol. 89] was told not to solicit any employees whatsoever in any manner, not to approach them, not to promise them anything in regards to either fringe benefits or any favoritism or anything else.

Q Did you follow those instructions? A Explicitly.

* * * *

Q Do you have any knowledge of the distribution of vacation pay checks for 1963? A Yes, I do.

Q Will you tell the hearing where the people that did not go out on strike received the vacation pay? A Did —

Q Did they? A Well, yes. They did.

Q Would you estimate what the number was of employees who got vacation pay that didn't go out on strike? A I would say approximately 35 or 40, the ones that didn't go out on strike.

Q That did not go out? A Yes.

Q Do you have any knowledge whether any people that initially went out crossed the picket line and came back to work, whether any of those people got vacation checks? A I would say yes, but I would like to qualify that. I may be wrong, there may be some but I don't know. I don't know exactly what you mean by that question.

Q I will try to explain and make it clear. The strike began May 16th, over 300 people walked out, is that correct? A That is correct.

Q Some, I think you said 50 or 60, didn't walk out. First of all did any of those people return to work? In

other words, cross the picket line and return to work [fol. 90] before the strike ended? Or, before they were replaced and discharged? A Yes.

Q Those people specifically, did they receive their vacation pay? A Yes, I believe so.

Q How many are in that group, sir, would you estimate? A Frankly, I have no knowledge of that.

Q Would you say it was upwards of about a dozen anyway? A You might be a little high, frankly.

Q How about eight? A Well, just for the sake of the record I will say eight, I don't know.

Q At least eight.

Do you have any idea when the vacation checks were issued? A 1963?

Q As to the people who walked out as well as to the people who walked out and then came back, what month? A I think it was in August.

Q You are familiar with this recently expired contract, General Counsel's Exhibit 2? A Yes.

TRIAL EXAMINER: Are you familiar with it?

THE WITNESS: Yes.

Q (By Mr. Sobieski) You wrote it didn't you? A I helped, yes.

Q Was the vacation pay usually paid in July? That is, based on that contract before the strike now in 1963? A It was usually paid in that general area, depending on whether or not we closed down the last week of June or the—and first week of July or whether we closed down the first two weeks of July.

Q You would testify that the contract was followed, if not specifically, at least in a broad area with the ex- [fol. 91] ceptions you have just testified to as to the plant closing down a certain time? A That is the general vacation period, yes, sir.

* * * *

TRIAL EXAMINER: Those people didn't go out on strike, did everyone who qualified under this contract generally receive vacation benefits?

THE WITNESS: To my knowledge, yes.

TRIAL EXAMINER: Everyone who qualified?

THE WITNESS: Everyone who qualified, that is correct.

* * * *

TRIAL EXAMINER: There is testimony in the record that some people while the strike was in progress abandoned the strike and returned to work. Is that correct?

THE WITNESS: That is correct.

TRIAL EXAMINER: Of those people who abandoned the strike and returned to work, of those qualifying under the terms of that contract receive vacation pay?

[fol. 92] THE WITNESS: May I say this, if they were not discharged prior to returning to work I would say that they qualified and received their vacation pay because there were some of them who were discharged and still returned and still did not receive vacation pay at the particular time we gave vacations.

TRIAL EXAMINER: The criteria for the returning employees was whether they had been replaced by a permanent employee?

THE WITNESS: Correct.

TRIAL EXAMINER: Why did you pay the vacation benefits to the people who did not go out on strike, those who qualified and received it, why did you pay it to them?

THE WITNESS: We had a particular policy and they were entitled to it.

TRIAL EXAMINER: Because they didn't go out on strike?

THE WITNESS: No, because they were there as of July the 1st, that was our policy.

TRIAL EXAMINER: And the others were not entitled to it because they were not there on July the 1st?

[fol. 93] THE WITNESS: They were not working as of July the 1st, they were replaced and discharged, in other words they were not employees of ours.

TRIAL EXAMINER: How about the employees who had not been discharged and who had been out on strike and had returned to work? And did receive vacation pay. Why did you pay it to them?

THE WITNESS: Because there was no break in the length of service.

* * * *

HARVEY GRANGER, JR.

was called as a witness by and on behalf of the Respondent and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Bowden) What is your name and address? A Harvey Granger, Jr. 1508 Forsyth Road, Savannah, Georgia.

Q What is your position at Great Dane Trailers, Inc.? A Plant Manager.

Q Did you attend negotiation sessions between the company and union in 1963? A I did.

Q How many of those sessions did you attend? A All of them.

Q Do you know whether the company received notice [fol. 94] of contract termination from the union during 1963? A I do.

Q It has been introduced in evidence as Respondent's 1, thereafter did the union go out on strike? A They did.

Q How many employees, if you know, went out on strike? A May I consult my notes?

Q Yes. A Our records indicate approximately 348 went out on strike.

TRIAL EXAMINER: The total employment was?

THE WITNESS: Approximately 400, sir.

Q Prior to the strike or at the beginning of the strike did you give foremen and supervisors instructions on how to conduct themselves during the strike? A I did.

Q What did those instructions consist of? A We instructed them to have as little contact as possible with the strikers—the striking employees and not to say—under no conditions to say anything that could be even vaguely construed as solicitation to return to work.

Q You are talking about individual solicitation? A Yes.

Q Were these instructions followed? A As far as I know they were, they were repeated at frequent intervals as long as the strike lasted.

Q Did you thereafter commence to replace these economic strikers? A We did.

Q Could you tell us how many strikers had been re-
[fol. 95] placed by July 1st, 1963? A Yes, approximately 259.

Q Could you tell us how many strikers had been replaced by August 1st, 1963? A Approximately 325.

Q How many strikers had been replaced by September 1st, 1963? A Approximately 339.

Q How many had been replaced by October 1st, 1963? A Approximately 342. The final replacements were made by October 8th.

Q How many were replaced during that time? A Between October 1st and October 8th, there were six left.

Q All had been replaced by October 8th? A Yes.

Q Did you receive any requests from individual employees about their vacation pay? A Yes.

Q Was that in the form of letters? A We received a whole series of letters, the form letter that has already been introduced.

Q I see. Did you receive any formal requests for vacation pay? A Yes, there was an attorney who represented the union.

Q I will hand you Respondent's 2 for identification and ask you if that is the letter you refer to? A This is the letter to which I refer.

* * * *

Q (By Mr. Bowden) What did you do with Respondent's Exhibit 2 when you received it? A I turned it over to you, Mr. Bowden.

Q Do you know if that letter was ever answered or not? A Yes, I received a copy of a letter that you wrote to Mr. Downing answering the letter.

[fol. 96] Q I hand you Respondent's Exhibit 3 for identification and ask you if that is what you refer to? A Yes, this is a copy of the letter to which I refer.

* * * *

Q (By Mr. Bowden) Do you recall, Mr. Granger, if the vacation pay was ever discussed in the bargaining sessions with the union after the union had cancelled the contract? A It was not.

Q Even after this correspondence with Mr. Downing? A It was not.

Q Was it discussed by the union? A It was not.

Q When did the strike cease? A The strike ceased on December 26th at midnight.

Q Did you receive a letter— A We had a letter from the Business Agent of the union a Mr. Harden.

Q I hand you Respondent's 4 for identification and ask you if that is what you refer to? A This is the letter.

* * * *

Q Mr. Granger, with reference to these requests for vacation pay did you pay any striker vacation pay under the terms of the contract? A No, we did not.

Q Why didn't you? A Because the union had cancelled the contract at the time the strike began.

Q Did you feel any obligation to honor a contract term that had been cancelled? A No.

Q Subsequent to the cancellation of the union contract did you formulate any rules for employees who [fol. 97] were then working in the plant? A We did. We had to have some rules.

Q Were those rules substantially the same as you now have—as you had had under the old contract, the expired or cancelled contract? A They were.

* * * *

Q (By Mr. Bowden) Do you know an employee by the name of Charles F. Youmans? A I do.

Q Did you ever have a conversation with Mr. Youmans about his status with you status with you or his rights A He called me on the telephone.

Q Did—will you identify the time if you can? A It was shortly after the strike and very shortly after we had sent Mr. Youmans a letter telling him that he had been replaced.

Q What did that call consist of? A He asked the status of his vacation pay.

Q What was he told? A He was told that we didn't know what—

TRIAL EXAMINER: You told him? A I told him that we did not know what was going on about vacation pay, but that if we owed it to him it would be paid.

Q Why was the policy—had you formed any policy at that time with reference to vacation pay? A We had turned it over to you for decision and an answer had not been given.

• • • •

[fol. 98] TRIAL EXAMINER: The hearing is closed.

(Whereupon, at approximately 2:45 o'clock p.m., the hearing in the above-entitled matter was closed.)

• • • •

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT No. 2

AGREEMENT

EFFECTIVE APRIL 1, 1960

THIS AGREEMENT, by and between GREAT DANE TRAILERS, INC. (hereinafter referred to as the Company) and INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL NO. 26, AFL-CIO (hereinafter referred to as the Union):

• • • •

ARTICLE VIII

Vacations

(a) Each qualified employee covered by this agreement shall be entitled after one (1) year of continuous employment, at a time agreeable to the Company, to a vacation of seven (7) consecutive days with pay for forty (40) hours at the rate of pay existing for such employee at the time of the beginning of his vacation. Each em-[fol. 99] ployee, after five (5) years' continuous service,

shall be entitled to a vacation of fourteen (14) consecutive days, with pay for eighty (80) hours. Any employee entitled to a vaction with pay may waive the right, if his services are needed by the employer, to such vacation during the period of this agreement, and in such cases shall be entitled to receive in lieu thereof, at the time he becomes entitled to the vacation, the amount of vacation pay such employee would otherwise have received over and above the wages received for work performed during the vacation period.

(b) To qualify for the said vacation, it is necessary that an employee shall have worked a total of fifteen hundred twenty-five (1525) hours in the said year; any time lost, however, because of an industrial accident while employed by this Company to count as part of the qualifying time.

(c) If an employee works less than 1525 hours who has been employed more than sixty (60) days, his vacation pay shall be based on the following schedule. If an employee has been continuously employed for five (5) years or more but has worked less than 1525 hours during the year preceding July 1, his vacation pay shall be twice the schedule in Column No. 2 below for number of hours worked:

[fol. 100]

Column No. 1 Hours of Service Within The Year	Column No. 2 Employees continuously employed more than 60 days but less than five years
1352 Hrs. to 1524 inclusive	27 Hrs.
1183 Hrs. to 1351 inclusive	23 Hrs.
1014 Hrs. to 1182 inclusive	20 Hrs.
841 Hrs. to 1013 inclusive	17 Hrs.
676 Hrs. to 844 inclusive	13 Hrs.
507 Hrs. to 675 inclusive	10 Hrs.
338 Hrs. to 506 inclusive	7 Hrs.
169 Hrs. to 337 inclusive	3 Hrs.

(d) Employees who have served less than sixty (60) days on the next July 1 after date of employment will

receive no vacation pay on that date but on the following July 1 will receive the vacation due in accordance with the above qualifying requirements, plus extra amount due in accordance with hours worked.

(e) In case of lay-off, termination or quitting, an employee who has served more than sixty (60) days shall receive pro rata share of vacation.

(f) All vacation pay shall be paid on Friday nearest July 1st, except as outlined in paragraph (d).

(g) All overtime hours are to be counted as straight time hours in computing qualifying time.

* * * *

[fol. 101] ARTICLE XI

Seniority

In the event an employee is working at a higher classification on similar work, this shall be considered as prima facie evidence of superior ability.

(1) In all cases of permanent promotion, reduction in classification, layoff, re-call, length of continuous service shall govern between individual employees when, in the judgment of the Management, they are on substantially the same basis as to ability and efficiency; provided, that this selection may be carried through Step 3 of the grievance procedure, if desired by the union.

An employee filing a grievance concerning seniority in layoff and recall must name the employee he claims to hold seniority over in his written and signed grievance. The grievance will then be processed according to the provisions of Article IX of this agreement and will be judged in accordance with the provisions of this article.

* * * *

(3) An employee's length of service shall be broken and no prior service shall be counted if such employee:

(a) voluntarily quits, or
(b) is discharged for cause, or

[fol. 102] (c) is laid-off and not recalled within one (1) year, or

(d) is off two (2) days without notifying the Company; or

(e) does not report for work when recalled unless within two (2) days, exclusive of Saturdays, Sundays and holidays, he presents an excuse acceptable to the Company, or

(f) if an employee overstays his authorized written leave of absence.

* * * *

ARTICLE XII

General

* * * *

D. Any employee dismissed by the Company shall receive his wages and personal property within twenty-four (24) hours, Sundays and holidays excluded, provided that all charges for tools, equipment or advances shall be deducted from his last pay unless accounted for and turned in. Any employee quitting of his own accord shall receive his wages on the regular scheduled pay day for that period in which he works, provided that all equipment, tools and advances have been satisfactorily accounted for at that time.

* * * *

[fol. 103] ARTICLE XIV

Duration

A. This Agreement shall be effective from the 1st day of April, 1960, and shall continue in full force and effect to and including March 31, 1963. It is agreed that on the anniversary date of this Agreement, this contract may be opened for the purpose of discussing basic wage rates only. All other terms and conditions of this Agreement to remain in full force and effect for its term. Thereafter, this Agreement shall continue in full force and effect from year to year unless either party hereto shall notify the other in writing not less than sixty (60) days

prior to the expiration of the terms or any extended term of the Agreement, of an intent to modify or terminate this Agreement. After receipt of said notice, negotiations shall commence not later than thirty (30) days before the expiration of this Agreement or any renewal thereof, and if such modifications are not completed prior to the expiration of the term of this Agreement, it shall remain in effect for an additional period of thirty (30) days, after which it may be terminated by either party by giving fifteen (15) days' written notice to the other.

B. It is understood and agreed that in the event of the notice referred to in Paragraph A of the intention to modify this Agreement, that any disagreement or dispute arising therefrom shall not be subject to arbitration except by mutual written agreement of all parties.

[fol. 104] IN WITNESS WHEREOF, the parties hereto, by their duly authorized representatives, have affixed their signatures the day and year first above-written.

* * * *

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT No. 3

Savannah, Georgia
July 12, 1963

Great Dane Trailers, Inc.
Lathrop Avenue
Savannah, Georgia
Attention: Mr. C. F. Hammond

Dear Sir:

Please consider this a demand that you pay my earned vacation pay in accordance with the Labor Agreement between the Company and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Local No. 26, effective April 1, 1960 through March 31, 1963, and that such vacation pay, which is now due, be paid me immediately.

Yours very truly,

HAH/m
cc: National Labor Relations Board
Atlanta, Georgia

[fol. 105] BEFORE THE
NATIONAL LABOR RELATIONS BOARD

RESPONDENT'S EXHIBIT No. 1

International Brotherhood of
Boilermakers • Iron Ship Builders
Brotherhood Building
Subordinate Lodge No. 26
Date April 30, 1963
Blacksmiths • Forgers & Helpers
Kansas City 1, Kansas
Address of Writer Below

2201 Bay Street Extension
Savannah, Georgia

Great Dane Trailers, Inc.
Lathrop Avenue
Savannah, Georgia

Attention: Mr. Brook Reeve, Jr., Vice-President

Gentlemen:

In accordance with the provisions of Article XIV of the Labor Agreement between your company and our Union, we are, hereby, giving you fifteen days written notice of our intention to terminate said Agreement dated April 1, 1960 through March 31, 1963.

Sincerely,

(Signed) H. A. HARDEN
Business Manager-Secretary-Treas.
Local 26

HAH/m
cc: C. W. Jones, IVP
R. K. Berg, IP

[fol. 106] BEFORE THE
NATIONAL LABOR RELATIONS BOARD

RESPONDENT'S EXHIBIT No. 2

Law Offices

Cowan, Zeigler, Downing & McAleer
Fourth Floor, Morel Bldg.
Bull and Bay Street
Savannah, Georgia

July 8, 1963

Telephone
236-4428

Richard T. Cowan
Frank B. Zeigler
Frank D. Downing
James E. McAleer

Mr. Harvey Granger,
Plant Manager
Great Dane Trailers, Inc.
Lathrop Avenue
Savannah, Georgia

Re: Vacation Pay

Dear Mr. Granger:

The undersigned is the legal representative for the International Brotherhood of Boilermakers, et al, Local # 26. Without setting forth any of the background of why these men are not now working for Great Dane, this communique is written only to ascertain when, where and how these employees can secure their vacation pay.

[fol. 107] If I understand the contract that was originally signed by Great Dane and the Brotherhood, the cut-off period for vacation is July 1st. The necessary hours have been worked to insure vacation pay. I can have these men come to the plant to receive their money but I would rather make arrangements to have them pick up same somewhere else. I can secure a Power of Attorney by the men would be delighted to pick up this money myself.

Will you please advise the writer as soon as possible your decision on the above. I thing this is an obligation that should be taken care of without delay.

With kindest regards, I remain,

Very truly yours,

COWAN ZEIGLER,
DOWNING & M'ALEER
(Signed) FRANK O. DOWNING

POD:dbf

[fol. 108] BEFORE THE
NATIONAL LABOR RELATIONS BOARD

RESPONDENT'S EXHIBIT No. 3

July 12, 1963

Frank O. Downing, Esquire
Cowan, Zeigler, Downing & McAleer
Attorneys at Law
Fourth Floor, Morel Bldg.
Bull and Bay Streets
Savannah, Georgia

Re: Great Dane Trailers, Inc.

Dear Sir:

Your letter dated July 8, 1963, addressed to Mr. Granger in regards to the vacation pay has been forwarded to my office for reply.

Please be advised that the vacation pay which you discuss in your letter arose under a former union contract. For your information, the union canceled this contract on May 1, 1963. At the present time, the company has been negotiating with the union over the terms of a new contract; however, we do not have any contract in force at this time. There also remains an important problem of whether the discharged employees would be entitled to any

vacation if we still had a contract in force. However, these are not legal questions but are questions which should be resolved at the bargaining table. At our next [fol. 109] meeting with the union, we shall be happy to discuss the matter of vacation pay with the committee at that time.

Very truly yours,

O. R. T. BOWDEN

ORTB:lw
cc: Mr. Harvey Granger, Jr.
Mr. Brooke Reeve

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

RESPONDENT'S EXHIBIT NO. 4

2201 Bay Street
Savannah, Georgia

December 23, 1963

Mr. Brooke Reeve, Jr.
Vice President
Great Dane Trailers, Inc.
Lathrop Avenue
Savannah, Georgia

Dear Sir:

At a meeting held on December 21, 1963, by employees of Great Dane Trailers, Inc., who are on strike, it was voted you call the strike off. This is to advise that as of December 27, 1963, 1201 A. M., the strike at your plant is officially called off.

The employees, shown on the attached list, hereby individually make an unconditional request and apply for

[fol. 110] reinstatement to their former or substantually equal positions. These men are immediately available for reinstatement and are ready, willing and able to work.

In addition to this formal request the individuals named on the attached list will make a personal appearance to apply for reinstatement and to reaffirm their request for unconditional reinstatement. Such personal appearances will be made on December 27, 1963, and shortly thereafter.

Very truly yours

(Signed) H. A. HARDEN
Business Manager
Local No. 26

HAH/go

CC: W. C. Phillips NLRB
General Council NLRB
Georgia Department of Labor
R. K. Bergio
C. W. Jones, IVP
C. L. Syave Sr.
O. R. T. Bowden

[fol. 111] BEFORE THE
NATIONAL LABOR RELATIONS BOARD
Tenth Region

Case No. 10-CA-5518

In the matter of:

GREAT DANE TRAILERS, INC.

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS LOCAL No. 26, AFL-CIO

Room 311, U. S. Post Office and Courthouse
Savannah, Georgia

TRANSCRIPT OF HEARING—May 19, 1964

* * * *

[fol. 112] HENRY HARDEN

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Sobieski) State your name forthe record, sir?

A Henry Harden.

Q Will you tell us what your connection is with this case?

A Business Manager for Boilermakers, Local 26.

Q Are you familiar with the strike that took place on May 16th, 1963?

A Yes, sir.

* * * *

[fol. 113] Q (By Mr. Sobieski) Do you know whether the striking employees ever got their vacation pay?

A Not to my knowledge.

MR. SOBIESKI: No further questions.
TRIAL EXAMINER: Is there any question that they didn't get it?
MR. BOWDEN: No.

* * * *

[fol.114] HARVEY GRANGER, JR.

was called as a witness by and on behalf of the Respondent and, having first been duly sworn, was examined and testified as follows:

* * * *

[fol. 115] CROSS EXAMINATION

Q (By Mr. Sobieski) Mr. Granger how long have you been worked at Great Dane as plant manager?
A I have been plant manager since 1960, '60 or '61.
Q When you came there was this contract already in force?
A When I became plant manager, yes, but I had been there previous to that. I had nothing to do with industrial relations.
A As plant manager then is it true that you are familiar with the particular article in that contract, which is article 8, which deals with vacation pay?
A Yes. I can't swear to you that it is article 8, but I am familiar with the vacation article.
I will take your word for it.
Q Look at that.
A Yes, I am familiar with that article 8, vacations.
Q Could you tell the hearing what the policy is re-
[fol. 116] garding employees that are either discharged or quit or leave for reasons of their own?
A The policy under this schedule?
Q Under this contract.
A If when they left they were paid accrued vacation pay it is in paragraph E of Article 8.
Q That is whether they were discharged for just cause or whether they just quit or whatever the reason might be?
A Correct.

* * * *

[fol. 117] BEFORE THE
NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT No. 2

AGREEMENT

between

GREAT DANE TRAILERS, INC.

and the

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Local No. 26

[Union Label]

Effective April 1, 1960
SAVANNAH, GEORGIA

[fol. 118] ARTICLE XI

Seniority

* * * *

(1) In all cases of permanent promotion, reduction in classification, layoff, re-call, length of continuous service shall govern between individual employees when, in the [fol. 119] judgment of the Management, they are on substantially the same basis as to ability and efficiency; provided, that this selection may be carried through Step 3 of the grievance procedure, if desired by the union.

* * * *

[fol. 120] (4) The Company agrees to furnish the Business Representative and the Chief Steward of the Union a list of all employees with seniority annually, one month after the anniversary date; on the 15th of the month, to furnish the Union the names of all employees added to

the seniority list during the previous month as provided in 2, and all persons whose seniority was broken for the reasons listed in 3 of this Article. The Company agrees to notify the Chief Steward as soon as possible when an employee is discharged for cause. The Company also agrees to furnish the Chief Steward of the Union with a change of status notification when an employee is promoted to another classification.

* * * *

[fol. 121] IN THE

UNITED STATES COURT OF APPEALS

No. 22427

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
February 8, 1966

[Title Omitted]

On this day this cause was called, and after argument by Elliott Moore, Attorney, N.L.R.B. for Petitioner, and by O.R.T. Bowden, Esq., for Respondent, was submitted to the Court.

[fol. 122] IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22427

NATIONAL LABOR RELATIONS BOARD, PETITIONER

versus

GREAT DANE TRAILERS, INC., RESPONDENT

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

OPINION—June 24, 1966

Before RIVES and GEWIN, Circuit Judges, and ALLGOOD, District Judge.

GEWIN, Circuit Judge: This case is before the Court upon the petition of the National Labor Relations Board (Board) for enforcement of its order issued against Respondent, Great Dane Trailers, Inc. (Company) to cease and desist from certain activities found by the Board to be violative of Section 8(a)(3) and (1) of the National [fol. 123] Labor Relations Act, 29 U.S.C.A. § 158(a)(3) and (1). The case is reported at 150 NLRB No. 55.

For a number of years the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local No. 26, AFL-CIO (Union) has been the collective bargaining representative of the employees at the Company's Savannah, Georgia, plant. The last contract between the Union and the Company was effective by its terms until March 31, 1963, and from thereafter until unilateral termination by either party upon 15 days notice. The contract contained the following pertinent provisions:

"(a) Each qualified employee covered by this agreement shall be entitled after one (1) year of continuous employment, at a time agreeable to the Company, to a vacation of seven (7) consecutive days with pay for forty (40) hours at the rate of pay existing for such employee at the time of the beginning of his vacation. Each employee after five (5) years continuous service, shall be entitled to a vacation of fourteen (14) consecutive days, with pay for eighty (80) hours. Any employee entitled to a vacation with pay may waive the right, if his services are needed by the employer, to such vacation during the period of this agreement, and in such cases shall be entitled to receive in lieu thereof, at the time he becomes entitled to the vacation, the amount [fol. 124] of vacation pay such employee would otherwise have received over and above the wages received for work performed during the vacation period.

"(b) To qualify for said vacation, it is necessary that an employee shall have worked a total of fifteen hundred twenty-five (1525) hours in the said year; any time lost, however, because of an industrial accident while employed by this Company to count as part of the qualifying time.

"(d) Employees who have served less than sixty (60) days on the next July 1 after date of employment will receive no vacation pay on that date but on the following July 1 will receive the vacation due in accordance with the above qualifying requirements, plus extra amount due in accordance with hours worked.

"(e) In case of lay-off, termination or quitting, employee who has served more than sixty (60) days shall receive pro rata share of vacation.

"(f) All vacation pay shall be paid on Friday nearest July 1st, except as outlined in paragraph (d)."

On April 30, 1963, the Union gave notice terminating the contract, and on May 16 approximately 348 of the Company's 400 employees went on strike.

[fol. 125] On July 12, 1963, a large number of striking employees demanded vacation pay allegedly due them under the provisions of the contract quoted above. The Company responded that since the formal contract with the Union had been terminated, it had unilaterally altered Company "policy" regarding vacation pay and that only those employees who were on the job July 1 of that year would receive any benefits. In the case of returning employees who had not been replaced, there was no break in service. The Company emphasized that while it had adopted substantially all of the vacation pay provisions of the prior contract, it was not granting vacation pay pursuant to that contract. It is admitted that vacation benefits were actually paid to all employees who met the contract qualifications but either did not strike on May 16, or abandoned the strike and returned to work before they were replaced.

In October 1963, the Union filed a complaint with the Board charging the Company with violation of Section 8(a)(3) and (1) of the Act by refusing to grant vacation pay due the striking employees under the terms of the contract because of their adherence to the Union's strike.

During the subsequent hearing before the trial examiner, the Company took the position that the contract giving the employees the right to vacation pay was no longer in effect and that even if it were still in effect, the Board could not properly exercise its jurisdiction to [fol. 126] construe and enforce its terms, since such jurisdiction rests in state and federal courts by virtue of Section 301 of the Labor-Management Relations Act, 29 U.S.C.A. § 185(a).[1] The hearing examiner concluded that the refusal to give vacation pay constituted a Section

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[1] § 185(a):

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

8(a)(3) and (1) violation and recommended an order requiring the payment of such benefits. The Board reviewed the proceedings and adopted the conclusions of the trial examiner for the following reasons:

> "We agree with the Trial Examiner that the denial of vacation pay to strikers who had not abandoned the strike by July 1, 1963, unlawfully discriminated against them because of their adherence to the Union's strike. Whether vacation pay was granted to those employees who were actually working on July 1, pursuant to the provisions of the expired contract, or was granted, as the Employer contends, as a unilaterally adopted policy formulated after the expiration of the contract, is immaterial. Any striker who had yet been permanently replaced was entitled, as an employee under Section 2(3) of the Act, to be treated in the same fashion as other employees. [fol. 127] And even those strikers who had been permanently replaced before the date of payment of vacation benefits were entitled to a pro-rate share, either under Article VIII(e) of the expired contract, or under the unilateral policy of the Employer which admittedly adopted substantially the same provisions on eligibility."

The Company here contends the Board erred because (1) its decision and order were necessarily grounded upon the construction of a collective bargaining agreement, and enforcement by the Board of a labor contract is contrary to the policies of the Act; and (2) alternatively, there was insufficient evidence to sustain the finding that the Company was motivated by anti-union sentiment in refusing to distribute the vacation pay benefits allegedly owed the striking workers.

We first turn to the question of whether the Board acted improperly by exercising its jurisdiction over this matter. The Company has consistently asserted that its policy of granting vacation pay is a purely unilateral action taken without any reference to the now-terminated collective bargaining contract. It is undisputed that such a "policy" is a "term or condition of employment" as described by Section 8. Those striking employees who had

not been replaced are definitely "employees" within the [fol. 128] meaning of Section 152(3) of 29 U.S.C.A.[2] Therefore, if it is alleged that the Company discriminated between striking and non-striking "employees" in regard to the "term or condition of employment" as proscribed by Section 8(a)(3) and (1), the Board clearly acted properly in exercising its authority to hold an inquiry and effect an appropriate remedy, if one is warranted, since this is an unfair labor practice charge in simplest terms. Thus, we can disregard the question of whether the Board *would* have acted improperly in exercising its jurisdiction to decide whether it was an unfair labor practice to withhold benefits due *under the contract*,[3] or whether such action would have violated the policies of the Act.

We next turn to the substantive issue of whether the Board had sufficient evidence to conclude the Company was motivated by anti-union sentiment in withholding vacation pay in violation of Section 8(a)(3) and (1). As the Supreme Court said in *American Shipbuilding Co.* v. *N.L.R.B.*, 13 L.Ed.2d 855, 863 (1965):

> "Section 8(a)(3) prohibits discrimination in regard to tenure or other conditions of employment to discourage union membership. Under the words of the [fol. 129] statute there must be both discrimination and a resulting discouragement of union membership. It has long been established that a finding of violation under this section will normally turn on the employer's motivation. See Labor Board v. Brown, 380 US 278, 13 L. ed 2d 839, 85 S Ct 980; Radio Officers' Union v. Labor Board, 347 US 17, 43, 98 L ed 455,

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[2] The Record shows that as many as 75% of the striking employees had been replaced by July 1.

[3] The Company contends that the Board "changed horses" on the jurisdictional question since the *complaint* alleged that the unfair labor practice arose by failure to pay benefits due *under the contract*. Parties to an unfair labor practice charge are not to be held to strict rules of pleading, since the purpose of the complaint is merely to set in motion the machinery of an inquiry. N.L.R.B. v. Fant Mill Co., 3 L.Ed.2d 1243 (1959); N.L.R.B. v. W. R. Hall Distributor, 341 F.2d 359 (10 Cir. 1965).

478, 74 S Ct 323, 41 ALR2d 621; Labor Board v. Jones & Laughlin Steel Corp., 301 US 1, 46, 81 L ed 893, 916, 57 S Ct 615, 108 ALR 1352."

Furthermore, the Court has required an "*affirmative*" showing by the Board of unlawful "motivation," *Local 357, International Brotherhood of Teamsters* v. *N.L.R.B.*, 6 L.Ed.2d 11 (1961); and, as we have often said, "an unlawful purpose is not lightly to be inferred," *N.L.R.B.* v. *McGahey*, 233 F.2d 406 (5 Cir. 1956).

The sole act of the Company upon which the Board made its finding of anti-union sentiment was the refusal to pay the vacation benefits. In effect, the Board held this act to be an ipso facto, per se violation. There was no supporting evidence whatsoever. To the contrary, the Board itself adopted the hearing examiner's conclusion in favor of the Company in a companion 8(a)(1) charge. There was also evidence presented in the hearing that the Company had gone to some lengths to *avoid* illegal em- [fol. 130] ployee pressuring.[4] Moreover, the Company contends it has never before been involved in an unfair labor practice controversy, and there is no record evidence that it has ever been so involved.[5] We can narrow the question, therefore, to whether the act of withholding the benefits is *by itself* sufficient evidence of unlawful motive. The Supreme Court confronted substantially the same issue in *American Shipbuilding*, *supra*, and stated the following at 13 L.Ed.2d 863-4:

> "But we have consistently construed the section to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership. See, e.g., Labor Board v. Mackay Radio & Telegraph Co. 304

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[4] The Hearing Examiner reported the following in his Decision:

"Docie [Personnel Manager of Company] testified that when the strike began, he was instructed by Company Counsel not to solicit any employee to return to work, or to make any promises regarding 'fringe benefits or any favoritism'; that he followed these instructions 'implicitly.'"

The Trial Examiner credited this testimony.

US 333, 347, 82 L ed 1381, 1391, 58 S Ct 904. Such a construction of § 8(a) (3) is essential if due protection is to be accorded the employer's right to manage his enterprise. See Textile Workers v. Darlington Mfg. Co. 380 US 263, 13 L ed 2d 827, 85 S Ct 994.

"This is not to deny that there are some practices which are inherently so prejudicial to union interests [fol. 131] and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other antiunion animus is required. In some cases, it may be that the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose."

Thus, we must decide whether the Company's withholding of vacation pay "carries with it an inference of unlawful intention *so compelling* that it is justifiable to disbelieve the employer's protestations of innocent purpose." (Emphasis added). We find that it does not. Based upon the term "so compelling", we conclude that if the "employer's conduct" carries with it *any other* reasonable inferences of a *legitimate motive*, the inference of illegality does not control. Although the record does not reveal any such alternative motives, we find it reasonable to infer that the Company might have acted (1) to reduce expenses; (2) to encourage longer tenure among present employees; or (3) to discourage early leaves immediately before vacation periods. We see nothing irregular about the failure of the Company to come forward with such evidence, although it might have benefitted their cause. The burden of proving motivation is on the Board. *N.L.R.B.* v. *McGahey, supra*, at 411.[5] When viewed in the light of the

[5] As we stated in *McGahey* at 411:

"Each was a perfectly sufficient explanation for the discharge of the particular employee and would itself sustain the burden, if it rested upon the employer, that the discharge of each was for the stated reasons. But the employer does not bear this duty. It is, rather on the General Counsel to establish by acceptable substantial evidence on the whole record that discharge came from the forbidden motives of interference in

[fol. 132] strong evidence showing otherwise exemplary conduct on the part of the Company during the strike, the argument favoring the inference of illegality becomes increasingly weaker.

There remains the question, whether judged by the standards announced in *Oil City Brass Works* v. *NLRB*, 357 F.2d 466 (5 Cir. 1966), there is substantial evidence in this record as a whole to support a factual finding that these acts were improperly motivated.

This case may be compared to *Bi-Rite Foods, Inc.*, 1964 CCH NLRB Cases ¶ 12,132, 147 N.L.R.B. 59 (1964). In that case the company offered certain benefits but the Union turned them down, electing instead to strike. "The employer sent a letter to strikers, giving the date he would replace strikers if they did not return. He also stated that on that date he would put into effect the wage, holiday, and vacation offer, he made before the strike. Eight or nine strikers out of the twenty-eight or twenty-nine returned to work, and the employer put the changes [fol. 133] into effect." 1964 CCH NLRB Cases ¶ 13,132 at 20, 941. The conduct in *Bi-Rite Foods, Inc.* was held not to constitute a refusal to bargain and, thus, not to be an unfair labor practice.

In the instant case essentially the same type of conduct took place. The terms of the vacation pay agreement were essentially the same as those the Union turned down as insufficient when it terminated the old contract. The fact that they applied only to employees who returned to work by July 1 is no more coercive than the implementation of new benefits in *Bi-Rite Foods, Inc.* In fact, it was not until July 12 that it became apparent the company would not pay the allegedly due benefits.

At the time the company refused to pay, a real question existed as to whether the replaced employees were

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employee statutory rights. The burden long imposed by this Court, N.L.R.B. v. Miami Coca-Cola Bottling Co., 5 Cir., 222 F.2d 431; N.L.R.B. v. Brady Aviation Corp., 5 Cir., 224 F.2d 23; N.L.R.B. v. Alco Feed Mills, 5 Cir., 133 F.2d 419; N.L.R.B. v. Tex-O-Kan Flour Mills, 5 Cir., 122 F.2d 433; N.L.R.B. v. Ray Smith Transport Co., 5 Cir., 193 F.2d 142, had added sanction by express terms of the Act."

entitled to those benefits. Two means existed for settling that issue. One, the Union could have bargained over the exact rights of employees. Two, the employees affected could have brought suit under section 301.

This is not a refusal to bargain, but is a case where the employer was accused of discouraging union membership. Certainly its assertion of a contested right in this case is no more coercive than the replacing of economic strikers. Yet no one could contend that that violated section 8(a)(3) and (1).

This Board proceeding is devoid of circumstantial evidence on which to base an inference of improper motive. [fol. 134] Nor is this the type of situation which the Board has seen so often that it can draw on a background knowledge of what is the usual intent of the employer. The complete absence of any primary facts on which an inference of improper motive can be based requires the conclusion that there is no substantial evidence in the record as a whole to support the Board's finding.

Having concluded, therefore, that there are insufficient facts shown by the record to support an inference of unlawful motivation; and that there is no substantial evidence in the record as a whole to support the conclusion that the Company violated Section 8(a)(3) and (1) of the Act, the petition for enforcement is DENIED.

[fol. 135]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22427

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GREAT DANE TRAILERS, INC., RESPONDENT

DECREE—July 21, 1966

Before: Rives and Gewin, Circuit Judges, and Allgood, District Judge.

BY THE COURT:

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the aforesaid Respondent on December 16, 1964. The Court heard argument of respective counsel on February 8, 1966, and has considered the briefs and transcript of record filed in this cause. On June 24, 1966, the Court being fully advised in the premises, handed down its decision denying Board's petition for enforcement of its order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fifth Circuit that enforcement of the said order of the National Labor Relations Board directed against Great Dane Trailers, Inc., its officers, agents, successors, and assigns, be and it hereby is denied.

ENTERED: July 21, 1966

[fol. 136]

[Clerk's Certificate (omitted in printing)]

[fol. 137]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1966

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

GREAT DANE TRAILERS, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—September 21, 1966

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 19th, 1966.

/s/ Hugo L. Black
Associate Justice of the Supreme Court of the United States

Dated this 21st day of September, 1966.

[fol. 138]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1966

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

GREAT DANE TRAILERS, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—October 20, 1966

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby further extended to and including Nov 18th, 1966.

/s/ Hugo L. Black
Associate Justice of the Supreme Court of the United States

Dated this 20th day of October, 1966

[fol. 139]

SUPREME COURT OF THE UNITED STATES

No. 781——, October Term, 1966

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

GREAT DANE TRAILERS, INC.

ORDER ALLOWING CERTIORARI—January 9, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 245914 608

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OCTOBER TERM, 1966

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GREAT DANE TRAILERS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this case on June 24, 1966.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-11a) is reported at 363 F. 2d 130. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 22-40, 56-59)[1] are reported at 150 NLRB 438.

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[1] "R." refers to "Volume I, Transcript of Record" and "J.A." refers to the Joint Appendix, both of which were filed in the court of appeals.

JURISDICTION

The decision of the court of appeals was rendered on June 24, 1966, and a decree was entered on July 21, 1966 (App. A, *infra*, p. 12a). By orders dated September 21 and October 20, 1966, Mr. Justice Black extended the time for filing a petition for certiorari to and including November 18, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Board found that the employer denied accrued vacation pay to striking employees who did not return to their jobs within about six weeks after a strike began, while awarding such benefits to those employees who did not strike or who abandoned the strike at an early date. The question presented is whether the Board properly held that this conduct violated Section 8(a)(1) and (3) of the National Labor Relations Act, in the absence of specific evidence of the employer's subjective intent to discriminate aginst the strikers.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B, *infra*, pp. 13a-14a.

STATEMENT

A. The Board's Findings of Fact

The collective bargaining agreement between the company, a manufacturer and seller of truck trailers

(R. 9, 11-12), and the Union [2] provided that employees with more than sixty days' service would receive vacation pay on the Friday nearest July 1 each year (J.A. 36-38). Employees who worked a total of 1,525 hours during the year qualified for the maximum vacation pay specified in the contract; those who worked fewer hours were awarded proportionately lower benefits, according to a contract schedule. The contract also provided that "[i]n case of lay-off, termination or quitting, an employee who has served more than sixty (60) days shall receive [a] pro rata share of vacation" pay (J.A. 38). There was no requirement that employees had to be at work on July 1 to qualify for vacation pay benefits.

This contract was effective until March 31, 1963, and thereafter from year to year unless terminated by notice of either party (R. 23-24; J.A. 36, 41). On April 30, 1963, following a temporary extension of the contract, the Union gave the Company timely notice of its intention to terminate the contract as of May 16, 1963. On that date, the Union began a strike in support of its contract demands, which was joined by about 350 of the Company's 400 employees (R. 25; J.A. 10, 12-13, 32, 41, 43). By July 1, about 260 strikers had been replaced, and a small number of strikers had returned to work. Some strikers also returned to work after that date, apparently as "new" employees (R. 25-27; J.A. 27-28, 32-33). The strike

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[2] Local 26, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, represented the employees at the Company's Savannah, Georgia plant.

was formally terminated in December 1963 (R. 25; J.A. 47-48).

On July 12, the strikers, all of whom had worked more than sixty days in the preceding year, requested their accrued vacation pay. The Company refused, stating that, since the Union had terminated the contract, no provision for vacation pay was in effect and that such payments, if any, would be subject to bargaining (R. 26; J.A. 11, 13-14, 42, 44-45, 46-47). In August, however, the Company made vacation payments to employees, qualified to receive such benefits, who had not gone on strike or had abandoned the strike and were at work on July 1. According to Company officials, these payments were not made pursuant to the prior contract, but in accordance with a "policy" embodying "substantially the same" provisions (R. 27; J.A. 35). The Company gave various explanations for its refusal to make similar payments to strikers who had been replaced or who had not abandoned the strike by July 1: (1) there was a "break in length of service," (2) these employees "were not working as of July the 1st," and (3) "they were replaced and discharged, in other words they were not employees of ours" (R. 26-27; J.A. 30-31).

B. The Board's Decision and Order

Upon the forgoing facts the Board held that the Company, by denying accrued vacation pay to strikers who had not abandoned the strike before July 1, unlawfully discriminated against them because of their adherence to the strike, in violation of Section 8(a)(1) and (3) of the Act. The Board held that the

strikers were entitled to "be treated uniformly with non-strikers with respect to whatever benefits accrue to the latter from the existence of the employment relationship" (R. 57-58). Accordingly, the Board ordered the Company to cease and desist from its unfair labor practices and to reimburse strikers for vacation pay unlawfully withheld from them (R. 49-50, 58).[3]

C. The Decision of the Court of Appeals

The court of appeals refused to enforce the Board's order. It held that the disparate treatment of strikers and non-strikers, without more, was insufficient to show an unfair labor practice. It construed this Court's decision in *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300, as establishing "that if the 'employer's conduct' carries with it *any other* reasonable inferences of a *legitimate motive*, the inference of illegality does not control" (App. A, *infra*, p. 9a; emphasis in original). Recognizing that "the record does not reveal any such alternative motives," the court nevertheless inferred that the Company might have awarded benefits to non-strikers and those who quickly abandoned the strike but not to other strikers for the following reasons: "(1) to reduce expenses; (2) to encourage longer tenure among present employees; or (3) to discourage early leaves immediately before vacation periods" (App. A, *infra*, p. 9a). It held that, since there was no "circumstantial evidence on which to

[3] The Board's order does not award vacation pay to the strikers based on any period in which they were on strike (R. 58, n. 2).

base an inference of improper motive," the Board's decision had no support in the record (App. A, *infra*, p. 11a).

REASONS FOR GRANTING THE WRIT

The holding of the court of appeals that it was not an unfair labor practice for the Company to deny accrued vacation pay to strikers who had not returned to their jobs by July 1, while awarding such pay to other employees, is contrary to this Court's decision in *National Labor Relations Board* v. *Erie Resistor*, 373 U.S. 221, and, if allowed to stand, would permit widespread discrimination in regard to important contractual benefits against employees exercising their right to strike.

1. In *Erie Resistor*, the Board had found that the employer discriminated against striking employees, in violation of Section 8(a)(1) and (3) of the Act, by awarding super-seniority to replacements and to strikers who had abandoned the strike and returned to work. This Court upheld the Board's finding of an unfair labor practice, even though there was no specific evidence of subjective intent to discriminate against the strikers and the employer claimed his action was essential to enable him to continue operating. The Court held that the Board properly found the requisite intent in "the inherently discriminatory or destructive nature of the [employer's] conduct itself" and properly concluded that the employees' interest in concerted action outweighed the business interests which allegedly underlay the super-seniority program (373 U.S. at 228, 236-237). This decision,

which was not even cited by the court below, should have been controlling here.

To be sure, there are differences between Erie Resistor's super-seniority plan and respondent's vacation pay "policy," but none of them is material here. The crucial element in both cases is that the employer's conduct, by its very nature, discriminated against employees who exercised their right to strike, a right guaranteed by Section 7 of the Act.[4] Although the Company's action was not in terms based upon strike activity, its necessary effect was to accord unfavorable treatment, *vis-à-vis* other workers, to strikers who had not returned to their jobs by July 1—and to these employees alone. As in *Erie Resistor*, regardless of any legitimate business purpose the employer's conduct might serve, "his conduct *does* speak for itself—it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended" (373 U.S. at 228; emphasis in original).

2. The court below ignored this Court's holding in *Erie Resistor* that conduct, such as respondent's, "which carried its own indicia of intent * * * is barred by the Act unless saved from illegality by an overriding business purpose justifying the invasion

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[4] As the Court pointed out in *Erie Resistor*, 373 U.S. at 233, Section 8(a)(1) protects the right to strike against employer interference and Section 8(a)(3) forbids discrimination in terms of employment to discourage participation in a legitimate strike.

of union rights" (373 U.S. at 231). Instead, it held that the inference of illegal intent is totally dispelled if "the employer's conduct carries with it *any other* reasonable inferences of a *legitimate motive*," even if the employer himself does not proffer any such explanation (App. A, *infra*, p. 9a; emphasis in original). This approach was expressly rejected in *Erie Resistor*.[5] The presence of a legitimate business motive does not automatically eradicate the natural inference of unlawful intent arising from inherently discriminatory conduct, as the court below held. Rather, it is necessary to balance "in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct" (373 U.S. at 229). This the Board correctly did.[6]

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[5] Indeed, as this Court pointed out in that case (373 U.S. at 229, n. 8): "In a variety of situations, the lower courts have dealt with and rejected the approach urged here that conduct otherwise unlawful is automatically excused upon a showing that it was motivated by business exigencies."

The court below misconstrued the quotation from the *American Ship Building* case, upon which it relied. The language quoted by the court below (App. A, *infra*, p. 8a) was not part of this Court's essential holding (not relevant to any issue in the present case) that the employer's use of a lockout was not an unfair labor practice. The quoted statements were merely part of the background for the Court's decision in that case; in essence, they were a restatement of the principles governing the decision in *Erie Resistor*. Surely, there was no intention in *American Ship Building* to modify the *Erie Resistor* decision.

[6] The following statement from *National Labor Relations Board* v. *Truck Drivers Union*, 353 U.S. 87, 96, quoted with

a. The employee right affected by respondent's discriminatory conduct is the right to strike—a right for which Congress has shown "repeated solicitude" and to which this Court has consistently accorded "generous interpretation." See *National Labor Relations Board* v. *Erie Resistor*, 373 U.S. 221, 233-234, 235, and cases cited. The penalty which the Company imposed upon its striking employees cannot be reconciled with the privileged position the right to strike occupies in the scheme of the Act. The fact that the Company did not deny vacation pay as a means of "breaking" the 1963 strike is immaterial. For, as the trial examiner found, the conduct was designed "to retaliate against the strikers for having engaged in * * * concerted activity" (R. 33). The effects of this retaliation on the future exercise of the right to strike and upon employee relations in general are obvious. But even if the Company's action had no deleterious future consequences, its discrimination against employees with regard to substantial rights,[7] solely because of strike activity, cannot escape the prohibitions of Section 8(a)(1) and (3).

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approval in *Erie Resistor*, 373 U.S. at 236, is apposite here:

> "The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review."

[7] The strikers were deprived of accrued benefits up to a maximum of the equivalent of 80 hours' pay (J.A. 36-38).

b. No legitimate business purpose overrides the interests of the strikers who were discriminated against here. Indeed, it is doubtful whether an employer can ever adduce legitimate business considerations to justify retaliation against employees who exercise their right to strike. In any event, as the court below acknowledged, the Company advanced no such explanation in this case.[8] And the reasons which the court itself conjectured (*supra*, p. 5) do not explain, much less justify, withholding of accrued benefits from the strikers.

3. The implications of the decision below extend beyond vacation pay benefits, important as they are in modern industrial relations. The court's rationale would apply to the great variety of fringe benefits—for example, bonuses, profit sharing and pension rights—to which many employees are contractually entitled today.[9] The decision below per-

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[8] The court below obviously rejected the Company's assertions that the disparate treatment of the strikers was justified because of their absence on July 1, the break in their service, or the loss of employee status (*supra*, p. 4). None of these considerations was relevant under the contract or the Company's unilaterally adopted "policy", which admittedly followed the contract's vacation pay provisions. Under the contract, continuity of service was a factor only in determining how much vacation pay an employee (with more than sixty days' service) would receive. And employee status as of July 1 was not required. Any employee who had worked more than sixty days was entitled to a *pro rata* share of vacation pay, even "in case of lay-off, termination or quitting" prior to July 1 (R. 36-38).

[9] Under the decision below (absent specific evidence of illegal intent), practically any discrimination with respect to financial benefits would seem permissible, since one could

mits employers to exact a forfeiture of the benefits which have accrued under such plans against employees who exercise their right to engage in a lawful strike, unless the Board can adduce specific evidence—apart from the forfeiture itself—of the employer's subjective intent to discriminate against striking employees. This decision—manifestly contrary to this Court's ruling in *Erie Resistor*—would seriously inhibit the exercise of the right to strike. Moreover, it promotes confusion as to the kind of employer conduct which may properly be found to carry "its own indicia of intent" and the kind of business justification sufficient to excuse "the invasion of union rights" (373 U.S. at 231). The decision should not be allowed to stand.

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readily attribute to such action one of the "legitimate motives" the court inferred here—*i.e.*, "to reduce expenses" or "to encourage longer tenure among present employees" (App. A, *infra*, p. 9a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JEROME I. CHAPMAN,
Assistant to the Solicitor General.

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General Counsel,

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NORTON J. COME,
Assistant General Counsel,

MALCOLM D. SCHULTZ,
Attorney,

National Labor Relations Board.

NOVEMBER 1966.

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22427

NATIONAL LABOR RELATIONS BOARD, PETITIONER

versus

GREAT DANE TRAILERS, INC., RESPONDENT

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(June 24, 1966.)

Before RIVES and GEWIN, Circuit Judges, and ALLGOOD, District Judge.

GEWIN, Circuit Judge: This case is before the Court upon the petition of the National Labor Relations Board (Board) for enforcement of its order issued against Respondent, Great Dane Trailers, Inc. (Company) to cease and desist from certain activities found by the Board to be violative of Section 8 (a) (3) and (1) of the National Labor Relations Act, 29 U.S.C.A. § 158(a) (3) and (1). The case is reported at 150 NLRB No. 55 [438].

For a number of years the International Brotherhood of Boilermakers, Iron Ship Builders, Black-

smiths, Forgers and Helpers, Local No. 26, AFL-CIO (Union) has been the collective bargaining representative of the employees at the Company's Savannah, Georgia, plant. The last contract between the Union and the Company was effective by its terms until March 31, 1963, and from thereafter until unilateral termination by either party upon 15 days notice. The contract contained the following pertinent provisions:

> "(a) Each qualified employee covered by this agreement shall be entitled after one (1) year of continuous employment, at a time agreeable to the Company, to a vacation of seven (7) consecutive days with pay for forty (40) hours at the rate of pay existing for such employee at the time of the beginning of his vacation. Each employee after five (5) years continuous service, shall be entitled to a vacation of fourteen (14) consecutive days, with pay for eighty (80) hours. Any employee entitled to a vacation with pay may waive the right, if his services are needed by the employer, to such vacation during the period of this agreement, and in such cases shall be entitled to receive in lieu thereof, at the time he becomes entitled to the vacation, the amount of vacation pay such employee would otherwise have received over and above the wages received for work performed during the vacation period.
>
> "(b) To qualify for said vacation, it is necessary that an employee shall have worked a total of fifteen hundred twenty-five (1525) hours in the said year; any time lost, however, because of an industrial accident while employed by this Company to count as part of the qualifying time.

"(d) Employees who have served less than sixty (60) days on the next July 1 after date of employment will receive no vacation pay on that date but on the following July 1 will receive the vacation due in accordance with the above qualifying requirements, plus extra amount due in accordance with hours worked.

"(e) In case of lay-off, termination or quitting, employee who has served more than sixty (60) days shall receive pro rata share of vacation.

"(f) All vacation pay shall be paid on Friday nearest July 1st, except as outlined in paragraph (d)."

On April 30, 1963, the Union gave notice terminating the contract, and on May 16 approximately 348 of the Company's 400 employees went on strike.

On July 12, 1963, a large number of striking employees demanded vacation pay allegedly due them under the provisions of the contract quoted above. The Company responded that since the formal contract with the Union had been terminated, it had unilaterally altered Company "policy" regarding vacation pay and that only those employees who were on the job July 1 of that year would receive any benefits. In the case of returning employees who had not been replaced, there was no break in service. The Company emphasized that while it had adopted substantially all of the vacation pay provisions of the prior contract, it was not granting vacation pay pursuant to that contract. It is admitted that vacation benefits were actually paid to all employees who met the contract qualifications but either did not strike on May 16, or abandoned the strike and returned to work before they were replaced.

In October 1963, the Union filed a complaint with the Board charging the Company with violation of Section 8(a)(3) and (1) of the Act by refusing to grant vacation pay due the striking employees under the terms of the contract because of their adherence to the Union's strike.

During the subsequent hearing before the trial examiner, the Company took the position that the contract giving the employees the right to vacation pay was no longer in effect and that even if it were still in effect, the Board could not properly exercise its jurisdiction to construe and enforce its terms, since such jurisdiction rests in state and federal courts by virtue of Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185(a).[1] The hearing examiner concluded that the refusal to give vacation pay constituted a Section 8(a)(3) and (1) violation and recommended an order requiring the payment of such benefits. The Board reviewed the proceedings and adopted the conclusions of the trial examiner for the following reasons:

> "We agree with the Trial Examiner that the denial of vacation pay to strikers who had not abandoned the strike by July 1, 1963, unlawfully discriminated against them because of their adherence to the Union's strike. Whether vacation pay was granted to those employees who were

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[1] § 185(a):

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

> actually working on July 1, pursuant to the provisions of the expired contract, or was granted, as the Employer contends, as a unilaterally adopted policy formulated after the expiration of the contract is immaterial. Any striker who had not yet been permanently replaced was entitled, as an employee under Section 2(3) of the Act, to be treated in the same fashion as other employees. And even those strikers who had been permanently replaced before the date of payment of vacation benefits were entitled to a pro-rata share, either under Article VIII(e) of the expired contract, or under the unilateral policy of the Employer which admittedly adopted substantially the same provisions on eligibility."

The Company here contends the Board erred because (1) its decision and order were necessarily grounded upon the construction of a collective bargaining agreement, and enforcement by the Board of a labor contract is contrary to the policies of the Act; and (2) alternatively, there was insufficient evidence to sustain the finding that the Company was motivated by anti-union sentiment in refusing to distribute the vacation pay benefits allegedly owed the striking workers.

We first turn to the question of whether the Board acted improperly by exercising its jurisdiction over this matter. The Company has consistently asserted that its policy of granting vacation pay is a purely unilateral action taken without any reference to the now-terminated collective bargaining contract. It is undisputed that such a "policy" is a "term or condition of employment" as described by Section 8. Those striking employees who had not been replaced are definitely "employees" within the meaning of Section

152(3) of 29 U.S.C.A.[2] Therefore, if it is alleged that the Company discriminated between striking and non-striking "employees" in regard to the "term or condition of employment" as proscribed by Section 8(a)(3) and (1), the Board clearly acted properly in exercising its authority to hold an inquiry and effect an appropriate remedy, if one is warranted, since this is an unfair labor practice charge in simplest terms. Thus, we can disregard the question of whether the Board *would* have acted improperly in exercising its jurisdiction to decide whether it was an unfair labor practice to withhold benefits due *under the contract*,[3] or whether such action would have violated the policies of the Act.

We next turn to the substantive issue of whether the Board had sufficient evidence to conclude the Company was motivated by anti-union sentiment in withholding vacation pay in violation of Section 8(a)(3) and (1). As the Supreme Court said in *American Shipbuilding Co.* v. *N.L.R.B.*, 13 L.Ed.2d 855, 863 (1965):

> "Section 8(a)(3) prohibits discrimination in regard to tenure or other conditions of employment to discourage union membership. Under the words of the statute there must be both dis-

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[2] The Record shows that as many as 75% of the striking employees had been replaced by July 1.

[3] The Company contends that the Board "changed horses" on the jurisdictional question since the *complaint* alleged that the unfair labor practice arose by failure to pay benefits due *under the contract*. Parties to an unfair labor practice charge are not to be held to strict rules of pleading, since the purpose of the complaint is merely to set in motion the machinery of an inquiry. N.L.R.B. v. Fant Mill[ing] Co., 3 L.Ed. 2d 1243 (1959); N.L.R.B. v. W. R. Hall Distributor, 341 F.2d 359 (10 Cir. 1965).

> crimination and a resulting discouragement of union membership. It has long been established that a finding of violation under this section will normally turn on the employer's motivation. See Labor Board v. Brown, 380 US 278, 13 L. ed 2d 839, 85 S Ct 980; Radio Officers' Union v. Labor Board, 347 US 17, 43, 98 L ed 455, 478, 74 S Ct 323, 41 ALR2d 621; Labor Board v. Jones & Laughlin Steel Corp., 301 US 1, 46, 81 L ed 893, 916, 57 S Ct 615, 108 ALR 1352."

Furthermore, the Court has required an *"affirmative"* showing by the Board of unlawful "motivation," *Local 357, International Brotherhood of Teamsters* v. *N.L.R.B.*, 6 L.Ed.2d 11 (1961); and, as we have often said, "an unlawful purpose is not lightly to be inferred," *N.L.R.B.* v. *McGahey*, 233 F.2d 406 (5 Cir. 1956).

The sole act of the Company upon which the Board made its finding of anti-union sentiment was the refusal to pay the vacation benefits. In effect, the Board held this act to be an ipso facto, per se violation. There was no supporting evidence whatsoever. To the contrary, the Board itself adopted the hearing examiner's conclusion in favor of the Company in a companion 8(a)(1) charge. There was also evidence presented in the hearing that the Company had gone to some lengths to *avoid* illegal employee pressuring.[4]

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[4] The Hearing Examiner reported the following in his Decision:

> "Docie [Personnel Manager of Company] testified that when the strike began, he was instructed by Company Counsel not to solicit any employee to return to work, or to make any promises regarding 'fringe benefits or any favoritism'; that he followed these instructions 'implicitly.'"

The Trial Examiner credited this testimony.

Moreover, the Company contends it has never before been involved in an unfair labor practice controversy, and there is no record evidence that it has ever been so involved. We can narrow the question, therefore, to whether the act of withholding the benefits is *by itself* sufficient evidence of unlawful motive. The Supreme Court confronted substantially the same issue in *American Shipbuilding, supra*, and stated the following at 13 L.Ed.2d 863-4:

> "But we have consistently construed the section to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership. See, e.g., Labor Board v. Mackay Radio & Telegraph Co. 304 US 333, 347, 82 L ed 1381, 1391, 58 S Ct 904. Such a construction of § 8(a)(3) is essential if due protection is to be accorded the employer's right to manage his enterprise. See Textile Workers v. Darlington Mfg. Co. 380 US 263, 13 L ed 2d 827, 85 S Ct 994.
>
> "This is not to deny that there are some practices which are inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other antiunion animus is required. In some cases, it may be that the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose."

Thus, we must decide whether the Company's withholding of vacation pay "carries with it an inference of unlawful intention *so compelling* that it is justifi-

able to disbelieve the employer's protestations of innocent purpose." (Emphasis added). We find that it does not. Based upon the term "so compelling", we conclude that if the "employer's conduct" carries with it *any other* reasonable inferences of a *legitimate motive*, the inference of illegality does not control. Although the record does not reveal any such alternative motives, we find it reasonable to infer that the Company might have acted (1) to reduce expenses; (2) to encourage longer tenure among present employees; or (3) to discourge early leaves immediately before vacation periods. We see nothing irregular about the failure of the Company to come forward with such evidence, although it might have benefitted their cause. The burden of proving motivation is on the Board. *N.L.R.B.* v. *McGahey, supra,* at 411.[5] When viewed in the light of the strong evidence showing otherwise exemplary conduct on the part of the Company during the strike, the argument

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[5] As we stated in *McGahey* at 411:

> "Each was a perfectly sufficient explanation for the discharge of the particular employee and would itself sustain the burden, if it rested upon the employer, that the discharge of each was for the stated reasons. But the employer does not bear this duty. It is, rather on the General Counsel to establish by acceptable substantial evidence on the whole record that discharge came from the forbidden motives of interference in employee statutory rights. The burden long imposed by this Court, N.L.R.B. v. Miami Coca-Cola Bottling Co., 5 Cir., 222 F.2d 431; N.L.R.B. v. Brady Aviation Corp., 5 Cir., 224 F.2d 23; N.L.R.B. v. Alco Feed Mills, 5 Cir., 133 F.2d 419; N.L.R.B. v. Tex-O-Kan Flour Mills, 5 Cir., 122 F.2d 433; N.L.R.B. v. Ray Smith Transport Co., 5 Cir., 193 F.2d 142, has added sanction by express terms of the Act."

favoring the inference of illegality becomes increasingly weaker.

There remains the question, whether judged by the standards announced in *Oil City Brass Works* v. *NLRB*, 357 F.2d 466 (5 Cir. 1966), there is substantial evidence in this record as a whole to support a factual finding that these acts were improperly motivated.

This case may be compared to *Bi-Rite Foods, Inc.*, 1964 CCH NLRB Cases ¶ 12,132, 147 N.L.R.B. 59 (1964). In that case the company offered certain benefits but the Union turned them down, electing instead to strike. "The employer sent a letter to strikers, giving the date he would replace strikers if they did not return. He also stated that on that date he would put into effect the wage, holiday, and vacation offer, he made before the strike. Eight or nine strikers out of the twenty-eight or twenty-nine returned to work, and the employer put the changes into effect." 1964 CCH NLRB Cases ¶ 13,132 at 20, 941. The conduct in *Bi-Rite Foods, Inc.* was held not to constitute a refusal to bargain and, thus, not to be an unfair labor practice.

In the instant case essentially the same type of conduct took place. The terms of the vacation pay agreement were essentially the same as those the Union turned down as insufficient when it terminated the old contract. The fact that they applied only to employees who returned to work by July 1 is no more coercive than the implementation of new benefits in *Bi-Rite Foods, Inc.* In fact, it was not until July 12 that it became apparent the company would not pay the allegedly due benefits.

At the time the company refused to pay, a real question existed as to whether the replaced employees were entitled to those benefits. Two means existed

for settling that issue. One, the Union could have bargained over the exact rights of employees. Two, the employees affected could have brought suit under section 301.

This is not a refusal to bargain, but is a case where the employer was accused of discouraging union membership. Certainly its assertion of a contested right in this case is no more coercive than the replacing of economic strikers. Yet no one could contend that that violated section 8(a)(3) and (1).

This Board proceeding is devoid of circumstantial evidence on which to base an inference of improper motive. Nor is this the type of situation which the Board has seen so often that it can draw on a background knowledge of what is the usual intent of the employer. The complete absence of any primary facts on which an inference of improper motive can be based requires the conclusion that there is no substantial evidence in the record as a whole to support the Board's finding.

Having concluded, therefore, that there are insufficient facts shown by the record to support an inference of unlawful motivation, and that there is no substantial evidence in the record as a whole to support the conclusion that the Company violated Section 8 (a)(3) and (1) of the Act, the petition for enforcement is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22427

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GREAT DANE TRAILERS, INC., RESPONDENT

DECREE

Before: Rives and Gewin, Circuit Judges, and Allgood, District Judge.

BY THE COURT:

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the aforesaid Respondent on December 16, 1964. The Court heard argument of respective counsel on February 8, 1966, and has considered the briefs and transcript of record filed in this cause. On June 24, 1966, the Court being fully advised in the premises, handed down its decision denying Board's petition for enforcement of its order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fifth Circuit that enforcement of the said order of the National Labor Relations Board directed against Great Dane Trailers, Inc., its officers, agents, successors, and assigns, be and it hereby is denied.

ENTERED: July 21, 1966

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act

as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1966

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

GREAT DANE TRAILERS, INC.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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OPINIONS BELOW

The decision of the Court of Appeals (Pet. 1a-11a)[1] is reported at 363 F.2d 130, 62 L. R. R. M. 2456. The Board's Decision and Order (R. 22-40, 56-59)[2] are reported at 150 N. L. R. B. 438, 58 L. R. R. M. 1097.

JURISDICTION

The Decision of the Court of Appeals was rendered on June 24, 1966 and a decree was entered on July 21, 1966. The jurisdiction of this Court is invoked under 28 U.S. C. 1254(1).

QUESTION PRESENTED

The issue here is whether the Court of Appeals was correct in holding that the Board could not find the employer in violation of Section 8(a)(1) and (3) of the National Labor Relations Act because it granted vacation pay to non-striking employees and

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[1] Reference to the Petition will be by the symbol "Pet." followed by the appropriate page number.

[2] "R" and "J.A." references are to the Transcript of Record and Joint Appendix filed in the Court below.

withheld vacation pay from striking employees when there was no evidence of anti-union sentiment and motivation behind such conduct.

STATUTE INVOLVED

The applicable portions of the National Labor Relations Act, as amended, (61 Stat. 136, 29 U.S.C. 151, et seq.) appear in Appendix B of the Petition.

STATEMENT

1. For some years the Union[3] has been the collective bargaining representative of Respondent's employees at its Savannah, Georgia, plant (R. 23). On April 30, 1963[4] the Union gave the Company notice terminating the existing contract and on May 16, approximately 348 employees, out of a work force of about 400, went on strike. The parties agreed that this was entirely an economic strike (R. 25). By July 1, approximately 259 of the striking employees had been replaced; by August 1, about 325 had been replaced and by October 8, all of the strikers had been replaced (R. 25-26; J.A. 32-33). By letters dated July 12, a number of the striking employees made demand upon the Company for payment of vacation pay claimed to be due them under the terms of the previously described contract (R. 25-26; J.A. 13, 42). In replying to the demand, the Company alluded to the fact that the Union had cancelled the contract approximately two months earlier and there was no contract in force at that time. The Company also raised the question of whether the discharged employees would be entitled under the contract to receive vacation benefits, even if the contract were in force. The Company further replied

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[3] International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local No. 26, AFL-CIO.

[4] All of the dates under discussion are in 1963, unless otherwise indicated.

that these were matters which should be resolved at the bargaining table and offered unconditionally to discuss the strikers' entitlement to vacation pay at the next negotiating session (J.A. 46-47).[5] The Union elected not to pursue the matter at the bargaining table (J.A. 34).

In August the Company afforded vacation pay to two categories of employees: (1) those who had not gone on strike and; (2) strikers who had returned prior to being discharged as a result of permanent replacement (J.A. 28, 30-31). Not all returning strikers received vacation pay (J.A. 30). The Company gave a simple explanation of its criteria for making payment: vacation pay was granted to all employees who "were there as of July the 1st" (J.A. 30).[6] These vacation benefits paid in August were in accordance with plant rules which the Company unilaterally promulgated after the Union terminated the existing contract and were not paid on the basis of the terminated contract, although the new rules were substantially the same as those which existed under the old contract (R. 27; J.A. 34-35).

2. The Board found that the Company violated Section 8(a)

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[5] In view of this offer Respondent must take issue with the Petitioner's statement (Pet. 4), that the Company refused payment and the implication that such refusal was solely the result of the Union's cancellation of the previous contract.

[6] It is noteworthy that the Company selected July 1, over a month earlier, as the date to qualify for vacation pay. Obviously this would not serve as an incentive for any of the strikers to return to work and it clearly was no reward to any striker who had returned subsequent to July 1. It is also significant that the new policy toward vacation pay was not given advance publicity and therefore did not act as inducement to the strikers to abandon their strike effort. In dismissing a portion of the charge the Board expressly found that the Company had not solicited the employees to abandon their strike and had made no offer of benefit if they would return to work (R. 35).

(1) and (3) of the Act in withholding vacation pay from employees who were not actually working on the July 1 qualification date, regardless of whether vacation pay was granted on the basis of the terminated contract or on the basis of the new rules adopted by the Company (R. 56-68). The Company was directed to cease and desist from withholding vacation pay from the employees and refrain from other unspecified acts of discrimination, interference or coercion (R. 37, 58-59).

3. The Fifth Circuit Court of Appeals, without dissent, denied enforcement of the Board's Order. It concluded that the facts gleaned from the record were not sufficient to support an inference of unlawful motivation and there was therefore "no substantial evidence in the record as a whole to support the conclusion that the Company violated Section 8(a)(3) and (1) of the Act . . ." (Pet. 11a). In arriving at this conclusion the court noted the requirements this Court has established as prerequisite to Section 8(a)(1) and (3) violations. One such requirement, it was pointed out, is an affirmative showing of unlawful motivation on the part of the employer. Recognizing that the record contained no evidence whatever of any such unlawful motivation, the Court of Appeals concluded that the Board had found the act of withholding the vacation pay "to be an ipso facto, per se violation" (Pet. 7a). The Court then considered whether the Company's conduct was of such a nature as to carry with it so compelling an inference of unlawful intention as to render it unnecessary to produce specific evidence of unlawful intent or other anti-union animus. The court concluded the Company's conduct in the instant case was not of such a nature (Pet. 8a-9a).

ARGUMENT.

The Court of Appeals held that it could not accept the Board's conclusion, arrived at without even a scintilla of evidence of unlawful anti-union motivation, that the employer committed an unfair labor practive by initiating a new practice for vacation pay,

to replace that contained in the previously terminated union contract, and withholding vacation pay from employees who were not actually working on a certain day more than a month before the new practice was announced and the payment was made.

It did *not* hold that it would be lawful under any circumstances, and not an unfair labor practice, for an employer to deny accrued vacation pay to striking employees, while granting such vacation pay to non-strikers and striking employees who had returned to work.

The decision of the Court of Appeals is not apt to have the far reaching consequences suggested by the Petitioner and is consistent with this Court's decision in *National Labor Relations Board v. Erie Resister*, 373 U. S. 221, 10 L.Ed2d 308 (1963). There is, therefore, no occasion for further review.

1. An analysis of the inherent characteristics of the super-seniority plan encountered in *Erie Resister* and subsequent comparison with the conduct involved in the instant case, leads to the inescapable conclusion that the reasoning advanced in *Erie* was not intended to be applicable to the type of situation involved herein.

One characteristic of the super-seniority plan was its rather obvious and significant effect on tenure. Under any interpretation of the vacation pay practice in the instant case, it clearly had no effect upon tenure.

Another aspect of super-seniority is the fact that it "necessarily operates to the detriment of those who participated in the strike, as compared to non-strikers". Here there is at best a very limited analogy to this case because the vacation plan did not necessarily operate to the detriment of strike participants as evidenced by the fact that some were given the same benefits as non-strikers.

Thirdly, it was said that super-seniority, which was made available to striking employees, is in effect an inducement to strikers to

abandon the strike. Clearly this was not the case here for the vacation plan, as it was first formulated and announced, could not by its very nature operate to benefit any then striking employee. It could not therefore have served as inducement to abandon the strike.[7]

Extension of super-seniority benefits, the Court noted, deals a crippling blow to the strike effort. It can hardly be said that payment for a single vacation period would so "undermine the strikers' mutual interest" as to jeopardize the strike effort, especially in view of the fact that some strikers who had abandoned the strike cause received nothing in the way of vacation pay. Further evidence of the lack of any crippling effect on the strike effort is the fact that the strike continued for months after the announcement and payment of the vacation benefits.

Finally, it was said the super-seniority rendered future collective bargaining difficult, if not impossible, for the bargaining representative because it would continue to be an issue long after the strike is over and would create a lasting cleavage between two employee groups, those who leaped up the seniority ladder and those who were left out. Once again the characteristic and effects of super-seniority do not exist here. Future bargaining on the matter of vacation benefits and other terms and conditions of employment will be no more difficult (let alone, impossible) in the future.[8]

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[7] The foregoing, coupled with the fact that the Board expressly found that the Company had not engaged in activity designed to induce the strikers to return, is perhaps the most important factor which distinguishes the instant case from *Erie Resister*.

[8] The Company offered to negotiate the question of the strikers entitlement to vacation pay in this particular instance, which indicates the bargaining representative had no cause to anticipate future difficulty negotiating such matters.

It is doubtful that any appreciable number of returning strikers qualified for the vacation pay and it must be obvious to the remaining strikers that those who did so came by the benefit purely by accident by returning prior to a date which, at the time they returned, was of no particiular significance. The vacation pay was given but one time and that was the end of it. Surely, this does not carry with it the type of day-to-day awareness a substantial overnight leap in seniority would have.

It is clear that in *Erie* this Court was motivated by what it felt was a duty to implement the Congressional "concern for the integrity of the strike weapon." The thrust of the opinion is concern that the strike would no longer be an effective weapon in the hands of organized labor. In short, the reasoning in *Erie* is the product of a consideration of the deference which must be accorded the strike weapon and the "devastating consequences" upon it which the super-seniority program precipitated.

It cannot be repeated too often that the employer's conduct in the instant case had no destructive effect upon the strike; indeed it had no noticeable effect whatever.

Furthermore the employer's conduct was not inherently discriminatory, as the Petitioner contends, because it did not, by its very nature, discriminate against employees who exercised their right to strike. The vacation pay was awarded to striker and non-striker alike; the sole basis of eligibility was the fact of working on July 1, not the fact that the worker had or had not exercised his right to strike.

2. The Court of Appeals did not ignore this Court's holding in *Erie Resister*. The very argument advanced by the Petitioner, derived almost exclusively from *Erie*, was considered and rejected by the Court below because the conduct with which it was dealing

simply did not measure up to the variety encountered in *Erie*.* Quoting from the decision of this court in *American Shipbuilding Co. v. National Labor Relations Board*, 380 U.S. 300, 13 L.Ed. 2d 855 (1965) the Court below recognized that some employer conduct may carry with it so compelling an inference of unlawful intention that it would be proper to disbelieve the employer's assertion of innocence. The court then squarely faced the issue and undertook to determine the applicability of the foregoing rule to the situation at hand when it said:

> "Thus, we must decide whether the Company's withholding of vacation pay 'carries with it an inference of unlawful intention *so compelling* that it is justifiable to disbelieve the employer's protestations of innocent purpose.' (Emphasis added). We find that it does not."

The quotation (Pet. 8) from the opinion below should not in fairness be considered out of context. It was immediately preceded by the holding that the employer's conduct was not of the inherently discriminatory variety found in *Erie* and discussed in *American Shipbuilding*. It was therefore no more than reaffirmation of the rule that the burden is on the Board to show an illegal motive, *Local 357, International Brotherhood of Teamsters v,*

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* Assuming the court did acknowledge the rationale of *Erie* but found it inapplicable to an extremely dissimilar factual situation, it is difficult to see where the alleged conflict with *Erie* exists. *Erie* did not purport to hold that all discriminatory conduct, regardless of motive, was *per se* unlawful and the prohibition of *Erie* was not intended to apply to all varieties of employer discrimination. The Court below held that it did not apply to the conduct involved here. By asking the Court to review this holding by means of certiorari, Petitioner assumes that *Erie* was intended to reach all forms of employer discrimination and the court below was obliged to apply *Erie* to this inherently different variety of conduct. The failure to do so is said to raise a conflict with that decision.

N.L.R.B., 6 L.Ed.2d 11 (1961), and unless the Board has produced at least some specific svidence of illegal intent or, in the alternative, an *Erie* variety of inherently discriminatory conduct is involved, the Section 8(a)(1) and (3) violation has not been established. In the instant case, there was admittedly no specific evidence of unlawful intent and the activity was greatly dissimilar from the super-seniority program.[10]

a. It is submitted that the fact the Company did not withhold vacation benefits in order to break the strike is quite material and the fact that this conduct had no effect whatever upon the strike is even more material. The existance of these two factors demonstrate the wide gulf separating this case from *Erie;* they also indicate there has been no encroachment upon congressional solicitude for the right to strike. The trial examiner's finding that the Company retaliated against strikers and the Petitioner's suggestion that it imposed a penalty upon them have in common the fact that they derive no support from the record. The allegation that the Company withheld vacation benefits "solely because of strike activity" is inconsistent with Petitioner's Statement of the case (Pet. 4).

b. It was not incumbent upon the Company to advance a "legitimate business purpose" because the conduct involved did not carry "its own indicia of intent". *National Labor Relations Board v. Erie Resister,* 373 U.S. 221 (1963). It was incumbent upon the Board to advance some evidence of illegal intent or purpose and this has not been done. Instead the Board conjectured that the employer's conduct was retaliation against striking employees and on the basis of such conjecture the Company was adjudged guilty of the 8(a)(1) and (3) violation.

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[10] The Board's quotation (Pet. 8, n.5) from this Court's opinion in *Erie* is afield of the matter under discussion. We are not here concerned with excusing unlawful conduct; we are concerned with what is required to establish unlawful conduct.

3. It cannot be said that the decision of the Court below will have any greater impact upon Labor-Management relations than the decisions of this Court relied upon in the opinion. The decision below does nothing to disturb the balance which earlier decisions of this Court have struck between the conflicting legitimate interests of both sides. It is submitted that an extension of the rationale of Erie to the type of situation involved here would promote considerable confusion as to just what employer conduct is permissible. Once the step is taken and Erie is found applicable to conduct which has no impact upon the right to strike it would be relatively simple to apply it to any type of employer conduct, despite the fact that no unlawful anti-union motive existed and despite the further fact that the conduct had no detrimental effect upon exercise of the right to strike or any other right guaranteed by the Act.

Neither the Board nor the Court below undertook to find anyone was "contractually entitled" to the vacation pay under discission. Even if it were determined that we were dealing with a contractually vested fringe benefit, it appears inconceivable that the Company could effectively work a forefeiture thereof in view of provisions of Section 301 of the Act and the remedy therein provided for contract breaches of this nature.

CONCLUSION

The special and important reasons do not exist for granting a writ of certiorari in this case and the petition should be denied.

Respectfully submitted.

HAMILTON & BOWDEN

By .....
(O.R.T. Bowden)

.....
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OCTOBER TERM, 1966

No. 781

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GREAT DANE TRAILERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 79–87) is reported at 363 F. 2d 130. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 15–28, 39–41) are reported at 150 NLRB 438.

JURISDICTION

The decision of the court of appeals was rendered on June 24, 1966, and a decree was entered on July 21, 1966 (R. 79, 88). By orders dated September 21 and October 20, 1966, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including November 18, 1966 (R. 89, 90). The petition was filed on November 11, 1966, and was

granted on January 9, 1967 (R. 91). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

An employer denied accrued vacation pay to those of its striking employees who had failed to return to their jobs by a certain date or had been previously replaced, but awarded such pay to all non-strikers and strikers who had abandoned the strike earlier. The question presented is whether the Board properly held that this conduct violated Section 8(a) (1) and (3) of the National Labor Relation. Act, in the absence of specific evidence that the employer had a subjective intent to discriminate against the strikers or interfere with strike activity.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.
>
> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

The Company, a manufacturer and seller of truck trailers at Savannah, Georgia (R. 8, 6), had a collective bargaining agreement with the Union,[1] which provided that employees with more than 60 days' service would receive vacation pay on the Friday nearest July 1 each year (R. 66–67). Employees who worked a total of 1,525 hours during the year qualified for the maximum pay specified in the contract;[2] those who worked fewer hours (down to 169 hours) were awarded proportionately lower benefits, according to a contract schedule (R. 65–66). The contract also provided that "[i]n case of lay-off, termination or quitting, an employee who has served more than sixty (60) days shall receive pro rata share of vacation" pay (R. 67).[3] There was no requirement that employees had to be at work on July 1 to qualify for such benefits.

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[1] Local 26, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO.

[2] Such maximum pay was, for employees with continuous employment of one to five years, the equivalent of pay for 40 hours of work at existing wage rates; and, for employees with more than five years' continuous service, the equivalent of such pay for 80 hours of work (R. 65–66).

[3] Plant Manager Granger confirmed (R. 76) that employees who were discharged or quit for reasons of their own were paid their accrued vacation pay.

This contract was effective until March 31, 1963, and thereafter from year to year unless terminated by notice of either party (R. 16, 68–69). On April 30, 1963, following a temporary extension of the contract, the Union gave the Company timely notice of its intention to terminate the contract as of May 16, 1963. On that date, the Union began an economic strike in support of new contract demands, which was joined by about 350 of the Company's 400 employees (R. 17, 43, 48, 49, 62, 70). By July 1, about 260 strikers had been replaced, and some had returned to work. Thereafter the Company continued to hire replacements, and the strike was formally terminated on December 26, 1963 (R. 17, 59–60, 63–64, 73–74).

Meanwhile, on July 12, some 300 strikers requested their "earned vacation pay" from the Company (R. 17, 48, 49–50, 55, 63, 69, 71–72). All had worked a sufficient period in the year preceding July 1 to qualify for such pay under the provisions of the prior contract; many had been in the Company's employ from 3 to 15 years and had received vacation pay in the past (R. 17, 22, 47–48, 50–51, 52–53, 54–55, 71–72). The Company replied that, since the Union had terminated the contract, no provision for vacation pay was in effect; the Company added that it would be happy to discuss the matter of vacation pay at the bargaining table (R. 17–18, 72–73). Shortly thereafter, however, the Company made vacation payments (1) to all employees who qualified under the prior contract and had not participated in the strike and (2) to qualified striking employees who had returned to work be-

fore July 1 and had not been replaced (R. 18, 60–61). But the Company denied accrued vacation pay to all strikers who had remained on strike beyond July 1 or had been replaced prior to that date, even though they satisfied the contract requirements for such pay (R. 17, 22, 61, 75–76).

At the hearing before the Board, a Company official testified that these payments were not made pursuant to the prior contract, but in accordance with a "policy" embodying "substantially the same" provisions (R. 18, 64). The Company gave various explanations for its refusal to make similar vacation payments to strikers who had been replaced or who had not abandoned the strike by July 1: (1) there was a "break in the length of service"; (2) these employees "were not working as of July the 1st"; and (3) "they were replaced and discharged * * * they were not employees of ours" (R. 18, 23, 61).

B. THE BOARD'S DECISION AND ORDER

Upon the foregoing facts, the Board concluded that, by denying accrued vacation pay to strikers who had not abandoned the strike by July 1 or had previously been replaced, the Company discriminated against them because of their adherence to the strike, in violation of Section 8(a) (1) and (3) of the Act (R. 39–40). The Board held that the strikers were entitled to "be treated uniformly with non-strikers with respect to whatever benefits accrue to the latter from the existence of the employment relationship" (R. 40). The Board ordered the Company to cease and desist from

its unfair labor practices and to reimburse strikers for vacation pay unlawfully withheld from them (R. 25–27, 41).[4]

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals refused to enforce the Board's order. It held that the Company's disparate treatment of strike adherents, on the one hand, and non-strikers and those abandoning the strike at an early date, on the other, did not, without more, violate Section 8(a) (1) and (3) of the Act. It construed this Court's decision in *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300, as establishing "that if the 'employer's conduct' carries with it *any other* reasonable inferences of a *legitimate motive*, the inference of illegality does not control" (R. 85, emphasis in original). While recognizing that "the record does not reveal any such alternative motives," the court found "it reasonable to infer that the Company might have acted (1) to reduce expenses; (2) to encourage longer tenure among present employees; or (3) to discourage early leaves immediately before vacation periods" (*ibid.*). Accordingly, it concluded that there was no "circumstantial evidence on which to base an inference of improper motive," and thus that the Board's decision had no support in the record (R. 87).

[4] The Board's order does not award vacation pay to the strikers for any period in which they were on strike; the amount is to be determined on the basis of the hours and days actually worked prior to the strike (R. 40, n. 2).

ARGUMENT

UNDER THE RULE OF *ERIE RESISTOR*, THE BOARD CORRECTLY RULED THAT THE EMPLOYER VIOLATED SECTION 8(a)(1) AND (3) OF THE ACT BY DENYING ACCRUED VACATION PAY TO STRIKERS WHO CONTINUED TO STRIKE BEYOND A CERTAIN DATE, OR WERE REPLACED BY THEN, WHILE AWARDING SUCH PAY TO OTHER EMPLOYEES

A. INTRODUCTION AND SUMMARY

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," which includes the right to strike.[5] Section 8(a)(3) makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to * * * discourage membership in any labor organization," which includes discouraging participation in concerted activities.[6] As we show below (pp. 10–14), the Company's denial of accrued vacation benefits to those of its employees who remained out on the strike called by the Union beyond a certain time, while granting such benefits to non-strikers and strikers who abandoned the strike before that time, necessarily discriminated against employees on the basis of their strike activity, and thus tended to interfere with, restrain, and discourage such activity. The basic question presented is whether the Company's

[5] The Act's solicitude for the right to strike is further shown by Section 13, which provides that: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike * * *."

[6] *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 233; *Radio Officers'* v. *National Labor Relations Board*, 347 U.S. 17, 39–40.

action was nonetheless lawful because of the absence of any showing that it was motivated by a subjective intent to penalize the strikers for their strike activity.

The governing principles were recently articulated by this Court in *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221. There, the Board had found that the employer discriminated against striking employees, in violation of Section 8(a) (1) and (3), by awarding super-seniority to replacements and to strikers who had abandoned the strike and returned to work. The Court upheld the Board's finding of an unfair labor practice, even though there was no specific evidence of subjective intent to discriminate against the strikers and the employer claimed his action was essential to enable him to continue operating.

Quoting from prior decisions,[1] the Court pointed out that, although it was important to show "the employer's intent or motive to discriminate or to interfere with union rights," "specific evidence of such subjective intent is 'not an indispensable element of proof of violation.' * * * 'Some conduct may by its very nature contain the implications of the required intent; the natural foreseeable consequences of certain action may warrant the inference' " (373 U.S. at 227). The Court added that, "when intent is founded upon the inherently discriminatory or destructive nature of the conduct itself," the employer "must be held to intend the very consequences which foreseeably and inescapably flow from his actions and if he fails to explain away, to justify or to characterize his actions

[1] *Radio Officers'* v. *National Labor Relations Board*, 347 U.S. 17, 44; *Teamsters Local 357* v. *National Labor Relations Board*, 365 U.S. 667, 675.

as something different than they appear on their face, an unfair labor practice charge is made out" (*id.*, at 228). Moreover, even where "the employer * * * claim[s] that his actions were taken * * * not to discriminate or to invade union rights but to accomplish business objectives acceptable under the Act," the Court recognized that "[n]evertheless, his conduct *does* speak for itself—it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended" (*ibid.*, emphasis in original). Accordingly, the Court concluded that "such situations present a complex of motives and preferring one motive to another is in reality the far more delicate task * * * of weighing the interest of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct" (*id.*, at 228–229). And " 'the function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review' " (*id.*, at 236).[8]

Applying these principles here, we shall show that: (1) the Company's policy in regard to vacation pay inherently discriminated against those strikers who adhered to the strike; (2) both the Company's asserted business justification and the justification

[8] Quoting from *National Labor Relations Board* v. *Truck Drivers Local 449*, 353 U.S. 87, 96.

supplied by the court below were insufficient to outweigh the injury to employee rights affected by the discrimination; and thus (3) the Board properly found a violation of the Act even though there was no showing that the Company had a subjective intent to penalize the employees because of their continued strike activity. Finally, we shall show that this conclusion is consistent with *American Ship Building Co.* v. *National Labor Relations Board,* 380 U.S. 300, which the court below erroneously relied upon, and that that decision in no way modified the sound principles enunciated in *Erie Resistor.*

B. THE COMPANY'S VACATION PAY POLICY NECESSARILY DISCRIMINATED AGAINST THOSE EMPLOYEES WHO WENT OUT, AND REMAINED, ON STRIKE

As set forth in the Statement (*supra,* pp. 4–5), on May 16, 1963, about 350 of the Company's 400 employees went out on strike in support of the bargaining demands of their union representative. In July, about 300 strikers requested the Company to give them the vacation pay which they had earned, through work performed prior to the strike, under the collective agreement which had been effective until May 1, 1963. Although these strikers had worked a sufficient period to satisfy the contract requirements for vacation pay and such pay had been earned during a period when the contract was indisputably in effect, the Company refused the strikers' request on the ground that, since the contract had been terminated, it was no longer obligated to make vacation pay-

ments. Nevertheless, shortly thereafter, the Company awarded vacation pay to all the employees who had not gone out on strike and to those strikers who had not been replaced and had returned to work before July 1. This was allegedly done pursuant to a "policy" embodying "substantially the same" provisions as the expired contract.

Clearly, this policy, by its very nature, discriminated against strikers and impaired the right to strike sufficiently to render a specific showing of unlawful motive unnecessary. The policy treated non-strikers and strikers who were not replaced and returned to their previous positions before July 1 differently from strikers who adhered to the strike and did not so return by that date; the former got the vacation pay which they had earned, prior to the strike, under the old contract, but the latter did not. Since the only difference between the two groups was that the favored class either did not strike or abandoned the strike early, whereas the non-favored class continued to adhere to the strike, their disparate treatment obviously turned on the exercise of the right to strike. As *Erie Resistor* makes clear, the Act prohibits such discriminatory treatment based upon participation in a lawful strike.[9]

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[9] The Company contends that the policy did not "discriminate against employees who exercised their right to strike" because "vacation pay was awarded to striker and non-striker alike" (Opp. to Pet. for Cert., p. 7). However, the only strikers who received such pay were those who were not replaced and returned to their previous positions before July 1; all strikers who were replaced before July 1 or who remained on strike after that time were penalized. Thus, here, no less

It is irrelevant that the Company's policy did not expressly distinguish between non-strikers and strikers who returned early, on the one hand, and employees who continued to strike, on the other. The policy, though phrased in neutral terms, necessarily operated so as to penalize *only* those employees who struck and were replaced or did not return to their jobs by July 1.[10] The Company obviously was aware that

than in *Erie Resistor Corp.*, *supra*—where super-seniority was awarded to returning strikers but not to those who remained on strike—the line was drawn on the basis of whether an employee exercised the right to continue to engage in a strike.

[10] There is no showing that any non-striker who had earned vacation pay was deprived thereof under the Company's policy because, for reasons unrelated to the strike, he happened to be absent from work on July 1. But even if this were the case, it would not exonerate the Company's punitive action against those who were away from work on July 1 because they were continuing to exercise their right to strike. The mere fact that others who are not engaging in Section 7 activity may be subjected to the same disability as the strikers does not lessen the interference with the strikers' Section 7 rights. Cf. *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793 (plant rule prohibiting all solicitation and literature distribution on company property cannot be applied to bar union activity during non-working time, though the rule predated the arrival of the union and had been impartially enforced to preserve plant discipline and prevent littering and pilfering); *National Labor Relations Board* v. *Washington Aluminum Co.*, 370 U.S. 9 (established plant rule forbidding employees from leaving their work without permission of the foreman cannot be applied to bar a concerted walkout over poor working conditions, protected by Section 7).

We are mindful of *Pittsburgh-Des Moines Steel Co.* v. *National Labor Relations Board*, 284 F. 2d 74 (C.A. 9); *National Labor Relations Board* v. *Community Shops*, 301 F. 2d 263 (C.A. 7); *Quality Castings Co.* v. *National Labor Relations Board*, 325 F. 2d 36 (C.A. 6); and *National Labor Relations Board* v. *National Seal*, 336 F. 2d 781 (C.A. 9)—holding that

strike adherents would be the victims of a "policy" against awarding vacation pay to persons "who were not working as of July the 1st" or who had been "replaced and discharged" (*supra,* p. 5). The Company knew that it had replaced about 260 strikers before July 1 and that, just prior to making the vacation payments, it had received letters indicating that about 300 persons were still on strike as of that date (*supra,* p. 4). In short, as the Board concluded (R. 23), "[s]tripped to its essentials" the Company's conduct was designed "to retaliate against the strikers for having engaged in this concerted activity."

Moreover, as the Board further ruled (R. 23), "the natural and foreseeable consequence" of this discrimination was to discourage the Company's employees from engaging in strike activity. Although the Company did not deny vacation pay as a means of "breaking" the 1963 strike (see Opp. to Pet. for Cert. pp. 3, n. 6; 6), the fact remains that those employees who continued to strike beyond July 1 or had been replaced by then were deprived of substantial monetary benefits which they had earned before the strike (see *supra,* p. 3 and n. 2). A denial of such accrued benefits to striking employees merely because they adhered to the

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the employer did not violate the Act by counting time spent on strike in determining whether strikers were qualified to receive bonuses or other employment benefits contingent upon working a certain period of time. Although the reasoning of some of these decisions is inconsistent with the analysis just suggested, the results in those cases may all be explained on the ground that, on balance, the court was of the view that the prejudice to employee interests from the particular policy involved was slight and outweighed by the business interest which it served. As we show *infra,* pp. 14–17, this is not true here.

strike would necessarily tend to discourage them and others from supporting strike activity in the future. To impose such a risk upon employees who exercise the right to strike is totally incompatible with the "deference paid the strike weapon by the federal labor laws." *Erie Resistor Corp., supra,* 373 U.S. at 235.

In sum, here, as in *Erie Resistor,* the Company's "conduct *does* speak for itself—it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended" (373 U.S. at 228, emphasis in original).[11]

C. THE DISCRIMINATION WAS NOT JUSTIFIED BY ANY OVERRIDING BUSINESS PURPOSE

1. The Company advanced various reasons for denying accrued vacation benefits to the strikers who, before July 1, had not returned to work or had been replaced. As the court below itself recognized in concluding that "the record does not reveal any such

[11] The factual differences between Erie Resistor's super-seniority plan and respondent's vacation pay policy are immaterial here. While it may be that Erie's plan had a more substantial effect on its employees, in light of its continuing impact, respondent's asserted justifications, and those conjectured by the court below (*infra*, pp. 14–17), are not nearly as strong as Erie's—*i.e.*, that the super-seniority plan was needed to enable it to attract replacements and thus to keep its plant in operation. Moreover, while it appears that a number of Erie's long-term employees who struck were not adversely affected by the super-seniority plan (see Brief for the National Labor Relations Board, No. 228, O.T. 1962, p. 15), *all* of respondent's employees who were replaced before July 1 or who were still on strike by then were deprived of vacation benefits other employees obtained.

[legitimate] motives" (R. 85), none of these reasons affords any valid justification for the Company's action.

In response to the strikers' letters requesting vacation benefits, the Company stated that, since the contract had been terminated, it was no longer obligated to pay such benefits (*supra,* p. 4). But, since the benefits had accrued before such termination, the termination did not eradicate the Company's past liability. Moreover, the Company did, in fact, pay accrued vacation benefits to its other employees, under a "policy" embodying "substantially the same" provisions as the prior contract (*supra,* p. 5).

2. Before the Board, the Company sought to justify its action on other grounds. It asserted that the benefits were denied to employees still on strike as of July 1 because they were not at work on that day and that the benefits were denied to strikers who had been replaced because they were either no longer "employees of ours," or had a "break in the length of service" [12] (*supra,* p. 5). But none of these considerations was relevant under the contract, and the Company's policy admittedly adopted the contract's vacation pay provisions.

The contract did not require an individual to be at work or to have employee status as of July 1 to be eligible for vacation pay. On the contrary, it specifically provided that any employee who had worked more than 60 days was entitled to a *pro rata* share of

[12] Some of the strikers who were replaced prior to July 1 returned to work after July 1, apparently as new employees (R. 17, n. 4; 61).

vacation pay, even "in case of lay-off, termination or quitting" prior to July 1 (R. 67), and Plant Manager Granger confirmed that such payments had been made to employees in that category (R. 76). Similarly, continuity of service was a factor under the contract only in determining *how much* vacation pay an employee (with more than 60 days' service) would receive;[15] it was irrelevant in determining his *eligibility* to receive any payments at all. Moreover, whatever their validity, none of these explanations reflects "an overriding business purpose justifying the invasion of union rights." *Erie Resistor Corp., supra,* 373 U.S. at 231.

3. Nor can the Company's action be justified by the reasons which the court below "inferred"—*i.e.,* "(1) to reduce expenses; (2) to encourage longer tenure among present employees; or (3) to discourage early leaves immediately before vacation periods" (R. 85). In the first place, these reasons were not advanced by the Company. As this Court noted in *Erie Resistor Corp., supra,* 373 U.S. at 228, it is the employer's obligation "to explain away" his inherently discriminatory conduct; "if he fails * * * an unfair labor practice * * * is made out." Not only is the employer in the best position to know what prompted his action, but for the court to substitute reasons different from those he gave precludes the Board from exercising its primary responsibility of balancing the conflicting interests involved (*id.* at 236).

[15] Thus employees with more than 5 years' continuous service received double the vacation benefits of employees with shorter tenure (R. 65–66).

In any event, there was no basis for the court's suggestion that the Company's purpose in denying accrued vacation pay to the strikers not at work on July 1 was to discourage early leaves before vacations or to encourage longer tenure. The Company's own action refutes the first suggestion, for, even assuming it is proper to view striking as taking "early leave," it did grant vacation pay to some strikers who took such "leaves"—*i.e.*, those who abandoned the strike and returned to their former positions before July 1. And a policy which results in a total forfeiture of earned monetary benefits because of absence from work on the very day the benefits are payable would hardly tend to encourage long tenure. The other justification supplied by the court—a desire to reduce expenses—could not possibly excuse placing the total burden of the cost saving on those employees who were adhering to the strike.

In sum, the Company's action of denying accrued vacation benefits to strikers who did not return to work, or had been replaced, before July 1 was justified by no business purpose which could outweigh the discriminatory and other deleterious effects of that action on the employees' protected right to strike. Accordingly, under the principles of *Erie Resistor, supra,* the Board properly concluded that the Company violated Section 8(a) (1) and (3) of the Act, even without specific proof that it had a subjective intent to discriminate against strikers or interfere with union activity.

D. THE *AMERICAN SHIP* DECISION DID NOT MODIFY THE PRINCIPLES OF *ERIE RESISTOR*

In holding that the Company did not violate the Act, the court below did not even cite *Erie Resistor*. Instead, it relied upon certain language in *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300, which it read as, in effect, qualifying the basic principle of *Erie Resistor*.[14] It is plain, however, that the court of appeals misconstrued *American Ship* and that that case does not modify *Erie Resistor*.

The holding in *American Ship* was that Section 8(a) (1) and (3) of the Act does not bar an em-

[14] The court also relied, erroneously, upon *Bi-Rite Foods, Inc.*, 147 NLRB 59 (R. 86). In *Bi-Rite*, the Board held that the employer neither violated his duty to bargain in good faith nor improperly interfered with the employees' right to strike when, after an impasse in bargaining occurred and the union called a strike, he announced that he would put into effect the wage, holiday, and vacation offer which had previously been made to, and rejected, by the union. It is well settled that an employer does not disparage the employees' union representative where, after an impasse in the bargaining is reached, he unilaterally puts into effect the *same* benefits which were previously offered to, but rejected, by the union. See *National Labor Relations Board* v. *Crompton-Highland Mills*, 337 U.S. 217, 224–225. In the present case, however, the Company's unilateral policy with regard to vacation benefits differed in material respects from the provisions of the prior contract, and there was no prior bargaining about the changes (R. 63–64). As shown, the contract provisions, unlike the Company's new policy, neither required that an employee be at work, or in the company's employ, on July 1 in order to receive accrued vacation benefits, nor discriminated against strikers.

ployer from locking out his employees after an impasse in bargaining negotiations had occurred, to advance his bargaining position. Prior to reaching this conclusion, the Court recounted some relevant general principles developed in prior decisions. As part of this background review, the Court, in discussing the situations in which specific evidence of an intent to discourage union membership or activity had been dispensed with, stated (380 U.S. at 311–312): "In some cases, it may be that the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose."

The court below, emphasizing the phrase "so compelling," construed this sentence as meaning that, should the reviewing court find that "the 'employer's conduct' carries with it *any other* reasonable inference of a *legitimate motive*, the inference of illegality" otherwise flowing from the inherently discriminatory nature of the employer's conduct "does not control" (R. 85, emphasis in original). But, the opinion in *American Ship* as a whole shows that the sentence relied on by the court below was referring to a situation where the employer was in fact motivated by anti-union considerations and his assertion of an innocent purpose was therefore a mere pretext.[15] This Court plainly was not suggesting that where, as here and in

[15] Thus, the Court explained (380 U.S. at 312), "where many have broken a shop rule, but only union leaders have been discharged, the Board need not listen too long to the plea that shop discipline was simply being enforced."

Erie Resistor, there is no evidence of anti-union motivation but the employer's action is nonetheless inherently discriminatory, such action would be lawful if there is any reasonably inferrable legitimate motive therefor. On the contrary, with reference to the latter situation, the Court in *American Ship* specifically recognized that the Board has the responsibility to weigh "'the interests of employees in concerted activities against the interest of the employer in operating his business in a particular manner'" (380 U.S. at 312, quoting from *Erie Resistor*).[16] The Board correctly performed that function here, and its order, therefore, should have been enforced.

[16] Nor does the Court's actual holding in *American Ship* reflect a rejection of this principle; the Court simply found it was inapplicable to the conduct there involved. Thus, the Court found that the employer's action in bringing economic pressure to bear in support of his bargaining position was not "in any way inconsistent with the right to bargain collectively or with the right to strike," nor did it "carry with it any necessary implication that the employer acted to discourage union membership or otherwise discriminate against union members as such" (380 U.S. at 310, 312).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions to enter a decree enforcing the Board's order.

Respectfully submitted.

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In the Supreme Court of the United States

October Term, [illegible]

National Labor Relations Board,
Petitioner,

v.

[illegible], Inc.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

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In The Supreme Court of the United States
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No. 781

NATIONAL LABOR RELATIONS BOARD,
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v.

GREAT DANE TRAILERS, INC.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

OPINIONS BELOW

The decision of the Court of Appeals (R. 79-87) is reported at 363 F. 2d 130, 62 L.R.R.M. 2456. The Board's Decision and Order (R. 39-41) are reported at 150 N.L.R.B. 438, 58 L.R.R.M. 1097.

JURISDICTION

The Decision of the Court of Appeals was rendered on June 24, 1966, and a decree was entered on July 21, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The issue here is whether the Court of Appeals properly held that the Board could not find the Company in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act because it withheld vacation pay claimed to be due striking employees when there was no

evidence of anti-union sentiment and motivation behind such conduct.

STATEMENT

For some years the Union[1] has been the collective bargaining representative of Respondent's employees at its Savannah, Georgia, plant (R. 15-16). On April 30, 1963[2] the Union gave the Company notice terminating the existing contract and on May 16, approximately 348 employees, out of a work force of about 400, went on strike. The parties agreed that this was entirely an economic strike (R. 17). By July 1, approximately 259 of the striking employees had been replaced; by August 1, about 325 had been replaced and by October 8, all of the strikers had been replaced (R. 17, 62-63). By letters dated July 12, a number of the striking employees made demand upon the Company for payment of vacation pay claimed to be due them under the terms of the expired contract (R. 17). In replying to the demand, the Company alluded to the fact that the Union had cancelled the contract approximately two months earlier and there was no contract in force at that time. The Company also raised an important problem, the question of whether the discharged employees would be entitled under the contract to receive vacation benefits, even if the contract were in force. The Company further replied that these were matters which should be resolved at the bargaining table and offered unconditionally to discuss the strikers' entitlement to vacation pay at the next negotiating session (R. 72-73)[3]. The Union elected

[1] International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local No. 26, AFL-CIO.

[2] All of the dates are in 1963, unless otherwise indicated.

[3] It was clear from the Company's reply that it considered the matter of the discharged employees' entitlement to vacation benefits to be of sufficient importance to merit discussion thereof at the negotiating sessions. Yet the Board insists upon omitting this fact and implies that the refusal to make immediate payment was solely the result of the Union's termination of the previous contract (Bd. Br. p.4).

not to pursue the matter at the bargaining table (R. 64).

Thereafter, in August the Company did afford vacation pay to employees whose eligibility to receive it was determined solely on the basis of whether they "were there as of July 1st" (R. 61)[4]. It was undisputed that the vacation benefits which were paid in August were in accordance with new plant rules which the Company unilaterally promulgated after the Union terminated the existing contract and were not paid on the basis of the terminated contract, although the new vacation policy was substantially the same as that which existed under the old contract (R. 18, 64). In practice, the new vacation policy afforded benefits to two categories of employees: (1) those who had not gone on strike and thus had remained in the Company's employ through July 1, and (2) strikers who returned and had not been replaced and discharged by July 1. (R. 60-61). Probably fewer than a dozen returning strikers received any vacation benefits under the new policy (R. 60). Other strikers did not qualify under the new policy because they had been replaced and discharged prior to July 1 and consequently they were not employees and were not working on that date (R. 61).

THE TRIAL EXAMINER

The entire theory of the Complaint, which, along with the Answer, framed the issues at the trial, was that the

[4] It is noteworthy that the Company selected July 1, over a month earlier, as the date to qualify for vacation pay. Obviously this would not serve as an incentive for any of the strikers to return to work and it clearly was no reward to any striker who had returned subsequent to July 1. It is also significant that the new policy toward vacation pay was not given advance publicity and therefore did not act as inducement to the strikers to abandon their strike effort. In dismissing a portion of the charge the Board expressly found that the Company had not solicited the employees to abandon their strike and had made no offer of benefit if they would return to work (R. 35).

Company violated Sections 8(a)(1) and 8(a)(3) by withholding from striking employees the vacation pay which accrued to them under the terms of the expired contract (R. 9-10). The Trial Examiner acknowledged that this was the approach taken by the General Counsel (R. 22). There was no reference in the Complaint to the vacation pay which the Company did distribute in August. The Complaint issued in April of the following year. The Trial Examiner was the first to attach any significance to the vacation pay afforded by the Company in August.

Beginning with the new vacation policy, formulated and implemented in August, the Trial Examiner inferred that it represented an unlawful attempt to induce employees not to strike or, in the case of those who did, to abandon the strike and return to work (R. 22-23). The strike, which the employees were to have been induced to refrain from, began approximately three months earlier on May 16. By the terms of the new vacation policy, no striker who returned after its announcement would qualify for any benefits. An unlawful motive was nevertheless inferred from the new vacation policy.

So preoccupied was the Trial Examiner with the vacation pay which was announced and distributed in August, he neglected to discuss the Company's reason for withholding vacation pay which allegedly accrued under the terms of the expired contract. The announcement that it would be withheld came a month earlier and this was acknowledged to be the only real issue regarding vacation benefits. Presumably the Trial Examiner felt there was some connection between the two,[5] inasmuch as he ulti-

[5]There is nothing in the record upon which to base an assumption that the two incidents were related in some fashion. The Company's reply to the demand for accrued benefits was directed to that demand and made no reference to any new vacation policy. There is no evidence whatever that any thought was given to a new vacation policy until later on in the month of August when it was announced.

mately concluded that the earlier incident of withholding benefits was a violation of the Act. He seems to reason that, because the new vacation policy was unlawful, the withholding of benefits under the old policy must have been also. The second inference emerges from the first and the chronological sequence is wrong.

The Trial Examiner recommended dismissal of the remaining charges that the Company had solicited strikers to return to work (R. 24-25).

THE BOARD

The Board affirmed its Trial Examiner's findings and conclusions. It reasoned that the denial of vacation pay to strikers who had not returned by July 1, 1963, "unlawfully discriminated against them because of their adherence to the Union's strike." The allegation in the Complaint was that the Company unlawfully withheld vacation pay from strikers who had requested it; not that it denied such pay to those employees who were still strikers on July 1. This date has no connection with the allegation in the Complaint. It is of significance only in connection with the new vacation policy, which was formulated some time after the event which prompted the charge, i. e. the Company's reply to the request for vacation benefits claimed to be due under the expired contract. The reply made no mention of July 1; it merely stated that, in view of the fact the contract had terminated and there was a question as to whether discharged and replaced employees would qualify, the matter of vacation pay should be discussed at the negotiating sessions then in progress (R. 72-73).

The Board did acknowledge at one point that the July 1 date was something which should be associated with the payment of vacation benefits, as opposed to withholding of such benefits, when it stated it was immaterial whether the vacation pay was given in accordance with the ex-

pired contract or granted as a result of the Company's unilaterally promulgated policy, instituted after the contract expired.

Because the two were considered to be *substantially* the same, the Board turned to a subsection of the expired contract and noted that, according to this provision, the strikers were entitled to some vacation benefits. It added that it was not interpreting the contract for the parties. (R. 39-40). Neither the subsection involved, nor the larger section of which it is a part, contains any reference to employment on July 1 as a prerequisite to qualification for vacation benefits (R. 65-67). In this sense, the contract and the policy are not the same.

COURT OF APPEALS

The Fifth Circuit Court of Appeals, without dissent, denied enforcement of the Board's Order. In doing so it drew from earlier decisions of this Court, including the quite recent decision in *American Shipbuilding Co.* v. N.L.R.B., 380 U.S. 300, 13. L.Ed. 2d 855 (1965). The Court of Appeals determined, as did this Court in *American Shipbuilding*, that a finding of an 8(a)(3) violation will normally turn on employer motivation. It then noted that this Court requires an affirmative showing by the Board of unlawful motivation. The Court of Appeals then turned to the record to determine the basis upon which the Board found anti-union motivation behind the Company's refusal to honor the claim for vacation benefits.

To begin with, it noted the fact that this was the Company's first involvement in an unfair labor practice dispute and the further fact that the companion 8(a)(1) charges were dismissed by the Board. In addition, there was "strong evidence showing otherwise exemplary conduct on the part of the Company during the strike". Finally, there

was a real question as to whether replaced employees were entitled to vacation benefits.

The Court was obliged to conclude there was no supporting evidence whatever for the Board's finding of unlawful motivation and the Board had determined that the refusal to pay vacation benefits was *per se* a violation of the Act. This being the case, the Court viewed its situation as being akin to that which confronted this Court in *American Shipbuilding, supra.* The Court of Appeals then concluded that the Company's action here was not of a nature as to fall within that category of practices, enumerated in *American Shipbuilding*, which are so prejudicial to the interests of the Union and so completely lacking in economic justification as to carry their own inference of unlawful motivation, thereby rendering specific evidence of unlawful intent unnecessary. Since the burden of proving motivation had not been satisfied, there was no substantial evidence in the record as a whole to support the conclusion that the Company violated the Act.

ARGUMENT

THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND IN NO SENSE CONFLICTS WITH THE HOLDING IN ERIE RESISTOR.[6]

ANALYSIS OF ERIE RESISTOR

The Board would prefer to urge the applicability of rules derived from another decision and barely touch upon the factual circumstances involved in that same decision. This is not difficult to understand where, as here, any

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[6] *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 10 L.Ed. 2d 308 (1963).

sort of analysis of the facts in the earlier decision would indicate the true basis of the reasoning adopted therein, and a comparison of the two factual situations would demonstrate the inapplicability of that reasoning.[7] We propose to make such an analysis because we feel it is basic to review by certiorari, where a decision is claimed to be in conflict with an earlier decision of this Court.

In the *Erie Resistor* case *all* of the Company's 478 employees joined the strike.[8] This immediately suggests a need to coax some of the employees to return if the Company is to operate with any degree of efficiency at all. Conscious of this need, the employer advised the Union *it was going to* hire replacements and *would* give these replacements some form of super seniority. The replacements were told they were not going to be laid off when the strike was over. Announcing the new policy in advance was obviously designed to induce the strikers to return.

The employer next advised the Union it would give 20 years additional seniority to replacements *and to any striker who returned.* Once again the purpose is obvious and it is equally apparent just to whom the announcement was directed. The results were forthcoming in short order. Four days after this last announcement the Company, which apparently had experienced considerable difficulty finding people to work, hired 34 new employees, 47 returned from layoff and 23 strikers accepted jobs. The following week 64 strikers returned and 21 replacements were hired, bringing the total of replacements to 102 and returning strikers to 87. The week after that 38 more strik-

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[7] The Board apparently adheres to the belief that factual differences between the two cases are of no consequence. (Bd. Br. p. 14).

[8] In the instant case, a nucleus of greater than 10% of the employees remained and were available to work with replacements.

ers returned, bringing the total to 125, and the Union capitulated.

The strike had been quite effective and had been in progress for about 10 weeks before the announcement was made regarding super seniority. Then, within 3 weeks, the Union was brought to its knees and the strike's effectiveness was completely destroyed. It requires no great amount of imagination to discover what brought this about.

Shortly after the strike ended, 173 employees resigned from the Union.

Sometime later there was a cut back in operations and nearly half the work force of 442 employees was laid off. Many of these were reinstated strikers whose seniority was insufficient as a result of the super seniority policy.

Following proceedings before the Board, the *Erie Resistor* case reached the Court of Appeals, which held that the employer's conduct, while otherwise unlawful, was excused upon a showing that it was motivated by business exigencies, i. e. the employer's compelling need to acquire a work force.

This Court reversed. In doing so, it focused its attention on two things: the inherent nature of the employer's super seniority policy and its effect on the strikers.

Beginning with the policy itself, the Court first observed the obvious and signif ant effect it had on tenure. This was pointed up by the experience of returning strikers in connection with the later reduction in work force. This affected all the strikers, the Court said, whereas replacement only affects those who are actually replaced. The prospect of losing one's job was serious enough. It is quite another thing to say that, in addition, an employee faces

the prospect of returning to a job with less seniority than the replacements and strikers who abandoned the effort.

In no sense did the vacation policy in the case at bar have any effect whatever upon tenure. Accordingly the hardships which accompanied the effect on tenure are completely lacking here.

Secondly, the super seniority policy necessarily operated to the detriment of participants in the strike, as opposed to non-participants.

This is simply not true here. The criteria for determining eligibility for vacation benefits under the plan announced by the Company was employment on a certain date and the benefits flowed to participants and non-participants. Granting vacation pay to non-participants is certainly no more severe than paying them a salary for their services. No obligation rests upon an employer to pay strike participants their regular salary. Why then should strikers claim entitlement to other monetary rewards for effort expended. The claim that vacation benefits, accruing under the expired contract, were unlawfully withheld is bottomed upon the false premise that the company's own vacation plan was somehow unlawful.

The third aspect of super seniority, which the Court discussed, was the fact that it served as an inducement to strikers to return to work. It was clear from the outset that this was its purpose and its effectiveness was clearly demonstrated.

As we had occasion to discuss earlier, the vacation policy adopted herein could not, by its nature, operate to benefit any striker who returned after it was made known. Under any interpretation of the facts, it is undisputed that the announcement regarding vacation benefits was made in Aug-

ust and it was beneficial only to persons working on July 1, over a month earlier. With reference to withholding benefits which allegedly accrued under the contract, the Company made it quite clear it questioned whether replaced and discharged employees would be entitled to it in any event. It was equally clear that further discussion of the subject would be in order. Nowhere and at no time was there any hint or suggestion from the Company that the strikers might enhance their chances of receiving this claimed vacation pay by returning to work.

We also deem it significant that nearly all the strikers had been replaced by the time the new vacation policy was announced and, for aught that appears, the Company was functioning quite well, without having to induce strikers to return.

The next factor in *Erie Resistor* was the crippling blow the super seniority plan dealt the strike effort. This was quite apparent from events which ensued after its announcement.

No such dramatic results followed either of the acts of wrongdoing attributed to the Company in this case. By the time they occurred most of the strikers had been replaced. This in itself would appear sufficient to deal the strike a crippling blow. The strike in *Erie Resistor* was destroyed within three weeks. In this case it lasted some five months after the incident which is said to occupy the same plane with super seniority.

The last factor the Court discussed in *Erie Resistor* was another effect of the super seniority plan—its effect upon future bargaining. It was noted that the plan made future bargaining difficult, if not impossible.

Not only has it not been demonstrated that later bargaining here was rendered difficult or impossible, quite the contrary appears. Further negotiating was in fact carried

on and the vacation pay was obviously no deterrent. The Company had offered to discuss it but the Union elected not to.

The cleavage between employees, which the Court alluded to in *Erie Resistor*, was clearly the result of ill feelings which might reasonably be expected when some strikers abandon their brethren, forsaking the mutual effort and purpose, and seize the bait offered by the employer to induce a return to his fold. Can it reasonably be urged that such a cleavage would result under the circumstances of the instant case. We think that clearly it would not. To begin with, as we noted previously, there was no bait offered the strikers. Strikers who received anything in the nature of vacation pay first learned they were going to receive it long after their return to work. It could not possibly have been a factor in their decision to return. The same holds true for employees who elected not to strike. The strike commenced on May 16, 1963. The decision not to join the strike had to have been made at that time. Knowledge that there would be vacation pay did not come until August. Once again, something else had to have influenced the employees in their decision not to become strikers.

If any cleavage results from this situation it is precisely the sort of cleavage which results in any strike situation where some employees in the unit elect not to join the strike or, having joined it, elect to return to work. The crucial point is that such cleavage does not result from something the employer said or did.

It is also significant that, in *Erie Resistor*, the company reinstated a number of strikers who remained true to the strike cause until its end. We submit that here we find the seeds of the inevitable discord among employees. These reinstated strikers would be thrust in the midst of those who were induced to abandon the strike and thereby destroyed its effectiveness.

A comparison of this with the instant case again reveals the lack of a valid analogy. Here all of the strikers were replaced and there were none to return with unkind feeling toward those who would not see the strike through to the desired conclusion.

It was felt that the super seniority would seriously impair future bargaining and rightfully so. We submit that unusual is the instance in which seniority is bargained away and, to prevent permanent cleavage, that is precisely what would have to be done.

In contrast, we are here concerned with quite a different item for negotiation—money, a term or condition of employment frequently bargained away. Certainly the matter of vacation pay would be a far less difficult matter to discuss and perhaps compromise. It appears unlikely that any employee would acquiesce in compromising his seniority rights. It would seem much more likely that some of the former employees would seriously consider compromising their claim for accrued vacation pay. The remainder would be free to pursue their remedy in a class action for breach of contract. The outcome of such a suit would lay the matter at rest. It would not have the lingering effects of the super-seniority program, a solution for which could not be found in the courts and probably not very readily at the bargaining table. Unlike the super seniority, the vacation pay would not be re-emphasized or resurrected with each layoff, promotion and the like.

APPLICABILITY OF ERIE RESISTOR

If we might, we would advance the thought that the following quotation from *Erie Resistor* indicates the primary motivation for the holding therein:

> "The history of this strike and its virtual collapse following the announcement of the plan empha-

size the grave repercussions of super-seniority."

And further:

> "As is not uncommon in human experience, such situations present a complex of motives and preferring one motive to another is in reality the far more delicate task, reflected in part in decisions of this Court, of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct."

The employer policy in *Erie Resistor* was a combination of threat and promise. That he was motivated by an unlawful purpose could not be doubted. The Court did no more than apply to him the recognized test of foreseeability. He must have foreseen the results of his program and, inasmuch as he proceeded with its implementation, he must have intended those results. Furthermore, there were results.

The Court was concerned for the right to strike, a right expressly sanctioned by Congress. Congressional sanction was meaningless in the face of what transpired in that case.

To extend the doctrine of *Erie Resistor* to a situation such as that presented here, where there had been no impairment of Congressional solicitude for the right to strike, will only invite further extension into other areas of employer conduct, some of which may have no bearing upon the right to strike. The reasoning in *Erie Resistor* is in effect as follows: the nature of the conduct is such that it will be deemed unlawful unless the Company can in some

fashion demonstrate that it was not. The cloak of guilt is removed only upon a showing of innocence. The effect of this on the burden of proof is readily apparent and the end result of placing the burden on the party complained of is contrary to one ageless aspect of our jurisprudence. We submit that such must remain an exception and not the rule. The Board ignores the extraordinary factual situation which prompted establishment of the exception and thereby overlooks the fact that the holding is exceptional. We submit that later decisions of the Court display a reluctance to extend the holding in *Erie Resistor* and these decisions should govern this case.

Indicative of the above is the decision in *Textile Workers Union of America v. Darlington Manufacturing Company*, 380 U. S. 263, 13 L.Ed. 2d 827, 85 S. Ct. 994 (1965), wherein it was said that the "ambiguous act of closing a plant following the election is not, absent an inquiry into the employer's motive, inherently discriminatory". It was also held that this conduct did not present an *Erie Resistor* situation in which the employer "must be held to intend the very consequences which foreseeably and inescapably flow from his actions."

Then in *National Labor Relations Board* v. *Brown*, 380 U.S. 278, 12 L. Ed. 2d 389, 85 S. Ct. 980 (1965) it was held that the conduct of a multi-employer group in locking out all employees and operating with replacements in response to a whipsaw strike against one of its members, was not "demonstrably destructive of employee rights" and therefore an inquiry into motive was essential.

In explanation of the holding, the Court said:

> "We begin with the proposition that the Act does not constitute the Board as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining de-

> mands.' *Labor Board v. Insurance Agents*, 361 U.S. 477, 497, 4 L. ed 2d 454, 8 S. Ct. 419. In the absence of proof of unlawful motivation, there are many economic weapons which an employer may use that either interfere in some measure with concerted employee activities, or which are in some degree discriminatory and discourage union membership, and yet the use of such economic weapons does not constitute conduct that is within the prohibition of either § 8(a)(1) or 8(a)(3)."

Finally, we consider the Court's decision in *American Shipbuilding Co.* v. *National Labor Relations Board*, 380 U.S. 300, 13 L.Ed. 2d 855 (1965). The Court below rested its decision primarily upon this case. The device employed by the Company was a temporary lockout to exert economic pressure and thereby enhance its bargaining position. Commenting thereon, the Court said:

> "The lockout may well dissuade employees from adhering to the position which they initially adopted in the bargaining, but the right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage."

The Court rejected the Board's argument that the lockout was inconsistent with the right to strike.

The Court discussed the *Erie Resistor* case and the type of conduct which carries so compelling an inference of unlawful intention, but added that the lockout did not fall within the category of instances "in which the Board may truncate its inquiry into employer motivation." As in the instant case, there was not the slightest evidence the employer was actuated by a desire to discourage membership in the Union.

Finally, the Court made the following observation, which we feel also applies here:

> "However, we think that the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management."

CONCLUSION

The special and important reasons do not exist for granting a writ of certiorari in this case.

Respectfully submitted.
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SUPREME COURT OF THE UNITED STATES

No. 781.—October Term, 1966.

National Labor Relations Board, Petitioner, *v.* Great Dane Trailers, Inc. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 12, 1967.]

Mr. Chief Justice Warren delivered the opinion of of the Court.

The issue here is whether, in the absence of proof of an antiunion motivation, an employer may be held to have violated §§ 8 (a)(3) and (1) of the National Labor Relations Act [1] when he refused to pay striking employees vacation benefits accrued under a terminated collective bargaining agreement while he announced an intention to pay such benefits to striker replacements, returning strikers, and nonstrikers who had been at work on a certain date during the strike.

The respondent company and the union [2] entered into a collective bargaining agreement which was effective by its terms until March 31, 1963. The agreement contained a commitment by the company to pay vacation benefits to employees who met certain enumerated qualifications.[3]

[1] National Labor Relations Act, as amended, §§ 8 (a)(3) and (1), 61 Stat. 140–141, 29 U. S. C. §§ 158 (a)(3) and (1).

[2] Local 26, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO.

[3] Article VIII of the collective bargaining agreement was entitled "Vacations." It read, in pertinent part:

"(a) Each qualified employee covered by this agreement shall be entitled after one (1) year of continuous employment, at a time agreeable to the Company, to a vacation of seven (7) consecutive days with pay for forty (40) hours at the rate of pay existing for such employee at the time of the beginning of his vacation. Each

In essence, the company agreed to pay specified vacation benefits to employees who, during the preceding year, had worked at least 1,525 hours. It was also provided that, in the case of a "lay-off, termination or quitting," employees who had served more than 60 days during the year would be entitled to pro rata shares of their vacation benefits. Benefits were to be paid on the Friday nearest July 1 of each year.

The agreement was temporarily extended beyond its termination date, but on April 30, 1963, the union gave the required 15 days' notice of intention to strike over issues which remained unsettled at the bargaining table. Accordingly, on May 16, 1963, approximately 350 of the company's 400 employees commenced a strike which

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employee after five (5) years continuous service, shall be entitled to a vacation of fourteen (14) consecutive days, with pay for eighty (80) hours. Any employee entitled to a vacation with pay may waive the right, if his services are needed by the employer, to such vacation during the period of this agreement, and in such cases shall be entitled to receive in lieu thereof, at the time he becomes entitled to the vacation, the amount of vacation pay such employee would otherwise have received over and above the wages received for work performed during the vacation period.

"(b) To qualify for said vacation, it is necessary that an employee shall have worked a total of fifteen hundred twenty-five (1525) hours in the said year; any time lost, however, because of an industrial accident while employed by this Company to count as part of the qualifying time.

"(d) Employees who have served less than sixty (60) days on the next July 1 after date of employment will receive no vacation pay on that date but on the following July 1 will receive the vacation due in accordance with the above qualifying requirements, plus extra amount due in accordance with hours worked.

"(e) In case of lay-off, termination or quitting, employee who has served more than sixty (60) days shall receive pro rata share of vacation.

"(f) All vacation pay shall be paid on Friday nearest July 1st, except as outlined in paragraph (d)."

lasted until December 26, 1963. The company continued to operate during the strike, using nonstrikers, persons hired as replacements for strikers, and some original strikers who had later abandoned the strike and returned to work.[4] On July 12, 1963, a number of the strikers demanded their accrued vacation pay from the company. The company rejected this demand, basing its response on the assertion that all contractual obligations had been terminated by the strike and, therefore, none of the company's employees had a right to vacation pay. Shortly thereafter, however, the company announced that it would grant vacation pay—in the amounts and subject to the conditions set out in the expired agreement—to all employees who had reported for work on July 1, 1963. The company denied that these payments were founded on the agreement and stated that they merely reflected a new "policy" which had been unilaterally adopted.

The refusal to pay vacation benefits to strikers, coupled with the payments to nonstrikers, formed the bases of an unfair labor practice complaint filed with the Board while the strike was still in progress. Violations of §§ 8 (a)(3) and (1) were charged. A hearing was held before a trial examiner who found that the company's action in regard to vacation pay constituted a discrimination in terms and conditions of employment which would discourage union membership, as well as an unlawful interference with protected activity. He held that the company had violated §§ 8 (a)(3) and (1) and recommended that it be ordered to cease and desist from its unfair labor practice and to pay the accrued vacation benefits to strikers. The Board, after reviewing the

[4] All strikers had been replaced by October 8, 1963. After their replacement, some strikers were rehired by the company, apparently as new employees.

record, adopted the Trial Examiner's conclusions and remedy.[5]

A petition for enforcement of the order was filed in the Court of Appeals for the Fifth Circuit. That court first dealt with the company's contention that the Board had lacked jurisdiction and that the union should have been relegated either to the bargaining table or to a lawsuit under § 301 of the Act,[6] since the basic question was one of contract interpretation and application. It noted that the company's announced policy relating to vacation pay clearly concerned a "term or condition of employment"; since it was alleged that the company had discriminated between striking and nonstriking employees in regard to that term or condition of employment, the complaint stated "an unfair labor practice in its simplest terms" and the Board had properly exercised its jurisdiction.[7] Reviewing the substantive aspects of the Board's deci-

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[5] The complaint also charged independent violations of § 8 (a) (1). These were rejected by the Trial Examiner and by the Board.

[6] § 301, Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185.

[7] In this Court the company apparently abandoned the argument under § 301. In any event, we agree with the Court of Appeals that the complaint, alleging as it did a discrimination in regard to a term or condition of employment, stated an unfair labor practice charge. The fact that the conduct complained of might also have supported an action under § 301 did not deprive the Board of jurisdiction. *Labor Board* v. *C & C Plywood Corp.*, 385 U. S. 421 (1967); *Mastro Plastics Corp.* v. *Labor Board*, 350 U. S. 270 (1956). Cf. *Smith* v. *Evening News Assoc.*, 371 U. S. 195 (1962). This, of course, is not to say that every breach of a collective bargaining agreement may be the subject of an unfair labor practice proceeding. But when the elements of an unfair labor practice are present in a breach of contract, the injured party is not automatically deprived by § 301 of his right to proceed before the Board where his remedy may be speedier and less expensive than a lawsuit. *Labor Board* v. *C & C Plywood Corp.*, *supra*, at 429–430.

sion next, the Court of Appeals held that, although discrimination between striking and nonstriking employees had been proved, the Board's conclusion that the company had committed an unfair labor practice was not well-founded inasmuch as there had been no affirmative showing of an unlawful motivation to discourage union membership or to interfere with the exercise of protected rights. Despite the fact that the company itself had not introduced evidence of a legitimate business purpose underlying its discriminatory action, the Court of Appeals speculated that it might have been motivated by a desire "(1) to reduce expenses; (2) to encourage longer tenure among present employees; or (3) to discourage leaves immediately before vacation periods." Believing that the possibility of the existence of such motives was sufficient to overcome the inference of an improper motive which flowed from the conduct itself, the court denied enforcement of the order. 363 F. 2d 130 (1966). We granted certiorari to determine whether the treatment of the motivation issue by the Court of Appeals was consistent with recent decisions of this Court. 385 U. S. 1000 (1967).

The unfair labor practice charged here is grounded primarily in § 8 (a)(3) which requires specifically that the Board find a discrimination and a resulting discouragement of union membership. *American Ship Building Co.* v. *Labor Board*, 380 U. S. 300, 311 (1965). There is little question but that the result of the company's refusal to pay vacation benefits to strikers was discrimination in its simplest form. Compare *Republic Aviation Corp.* v. *Labor Board*, 324 U. S. 793 (1945), with *Teamsters Union* v. *Labor Board*, 365 U. S. 667 (1961). Some employees who met the conditions specified in the expired collective bargaining agreement were paid accrued vacation benefits in the amounts set forth

in that agreement, while other employees [8] who also met the conditions but who had engaged in protected concerted activity were denied such benefits. Similarly, there can be no doubt but that the discrimination was capable of discouraging membership in a labor organization within the meaning of the statute. Discouraging membership in a labor organization "includes discouraging participation in concerted activities . . . such as a legitimate strike." *Erie Resistor Corp.* v. *Labor Board*, 373 U. S. 221, 233 (1963). The act of paying accrued benefits to one group of employees while announcing the extinction of the same benefits for another group of employees who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on either present or future concerted activity.

But inquiry under § 8 (a)(3) does not usually stop at this point. The statutory language "discrimination . . . to . . . discourage" means that the finding of a violation normally turns on whether the discriminatory conduct was motivated by an antiunion purpose. *American Ship Building Co.* v. *Labor Board*, 380 U. S. 300 (1965). It was upon the motivation element that the Court of Appeals based its decision not to grant enforcement, and it is to that element which we now turn. In three recent opinions we considered employer motivation in the context of asserted § 8 (a)(3) violations. *American Ship Building Co.* v. *Labor Board, supra; Labor Board* v. *Brown*, 380 U. S. 278 (1965); and *Erie Resistor Corp.* v. *Labor Board, supra.* We noted in *Erie Resistor, supra,*

[8] National Labor Relations Act, as amended, § 2 (3), 61 Stat. 137, 29 U. S. C. § 152 (3), declares:

"The term 'employee' . . . shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . and who has not obtained any other regular and substantially equivalent employment . . . ."

at 227, that proof of an antiunion motivation may make unlawful certain employer conduct which would in other circumstances be lawful. Some conduct, however, is so "inherently destructive of employee interests" that it may be deemed proscribed without need for proof of an underlying improper motive. *Labor Board* v. *Brown, supra,* at 287; *American Ship Building Co.* v. *Labor Board, supra,* at 311. That is, some conduct carries with it "unavoidable consequences which the employer not only foresaw but which he must have intended" and thus bears "its own indicia of intent." *Erie Resistor Corp.* v. *Labor Board, supra,* at 228, 231. If the conduct in question falls within this "inherently destructive" category, the employer has the burden of explaining away, justifying or characterizing "his actions as something different than they appear on their face," and if he fails, "an unfair labor practice charge is made out." *Id.*, at 228. And even if the employer does come forward with counter explanations for his conduct in this situation, the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy. *Id.*, at 229. On the other hand, when "the resulting harm to employee rights is . . . comparatively slight, and a substantial and legitimate business end is served, the employer's conduct is prima facie lawful," and an affirmative showing of improper motivation must be made. *Labor Board* v. *Brown, supra,* at 289; *American Ship Building Co.* v. *Labor Board, supra,* at 311–313.

From this review of our recent decisions, several principles of controlling importance here can be distilled. First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an anti-

union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him.

Applying the principles to this case then, it is not necessary for us to decide the degree to which the challenged conduct might have affected employee rights. As the Court of Appeals correctly noted, the company came forward with no evidence of legitimate motives for its discriminatory conduct. 363 F. 2d, at 134. The company simply did not meet the burden of proof, and the Court of Appeals misconstrued the function of judicial review when it proceeded nonetheless to speculate upon what *might have* motivated the company. Since discriminatory conduct carrying a potential for adverse effect upon employee rights was proved and no evidence of a proper motivation appeared in the record, the Board's conclusions were supported by substantial evidence, *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474 (1951), and should have been sustained.

The judgment of the Court of Appeals is reversed and the case is remanded with directions to enforce the Board's order.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 781.—October Term, 1966.

National Labor Relations Board, Petitioner, v. Great Dane Trailers, Inc. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 12, 1967.]

Mr. Justice Harlan, whom Mr. Justice Stewart joins, dissenting.

Because I think that the Court puts forth a premise which misinterprets the recent decision in *N. L. R. B.* v. *C & C Plywood Corp.*, 385 U. S. 421, and has proposed a determining rule based on a distillation of prior opinions which is, in my view, substantially inaccurate, I am constrained to express my dissent from its opinion. I believe that the Fifth Circuit correctly analyzed the problem, and that its decision should be affirmed.

The Court begins by stating that vacation benefits had "accrued" under the contract, and implies that striking employees had a contractual right to such benefits which was arbitrarily disregarded by Great Dane in order to punish those employees for engaging in protected activity. Were these the properly established facts of the case, I would have little difficulty in concurring in the result reached by the majority. Employer action which undercuts rights protected by § 7 of the Act and has no inferrable, legitimate business purpose has been held a violation of § 8 (a)(3) and (1). *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793. But the contract dispute is not so frivolous as to be determined without examination,[1] and the issue framed by the Court

[1] The union elected to terminate the contract raising the question whether any right to vacation pay survived the termination. Also

is not properly before us. Moreover, contrary to the Court's assertion, neither the Board nor the lower court limited itself to considering this issue, and both recognized a limitation on the Board's contract interpretation powers in light of § 301 of the Act.[2]

The Board disclaimed "interpreting the contract for the parties" and held only that "strikers must be treated uniformly with nonstrikers with respect to whatever benefits accrue to the latter from the existence of the employment relationship." It explained that its order would merely force the employer to use the same vacation pay criteria for all employees and only prevent Great Dane from using the requirement that a recipient be at work as of July 1, 1963. The Court of Appeals considered the "term or condition of employment" at issue to be the employer's unilaterally declared vacation "policy." It explicitly disregarded "the question of whether the Board *would* have acted improperly . . . to decide whether it was an unfair labor practice to withhold benefits due *under the contract* . . . . [*sic*]" 363 F. 2d 130, 133.

I think the Board and the Court of Appeals were correct in disregarding the contract issue. In *N. L. R. B.* v. *C & C Plywood Corp., supra,* which the Court says upholds jurisdiction to consider the contract, we faced a situation in which an employer had taken a unilateral action with respect to wages which was a prima facie

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the contract provided for vacation pay only when the employee was not actually granted a vacation, and the choice lay with the employer. Thus under the contract the employer was not obligated to grant two weeks additional pay, but could choose to grant vacation instead and lower the total cash outlay. Termination precluded exercise of that choice.

[2] 29 U. S. C. § 185 (a). This position is supported by the legislative history discussed in *N. L. R. B.* v. *C & C Plywood Corp.*, 385 U. S. 421, at 427.

violation of § 8 (a)(3) and was attempting to justify that action by contractual privilege. The Court held that the interposition of a contractual defense could not deprive the Board of jurisdiction to "enforce a statutory right"[2] where the Board had "not construed a labor agreement to determine the extent of the contractual rights which were given the union by the employer." *Id.*, at 428. Also the agreement involved in that case did not contain an arbitration clause and thus the strong policy favoring arbitration was not infringed by the Board's action. *Id.*, at 426. Here the Court's statement of the issue would imply that the Board may consider an unfair labor practice founded solely on breach of a contractual duty, and the labor agreement seems to invoke the remedy of arbitration.[3] In these circumstances, I think the only issue properly before the Court is whether the employer's unilaterally declared vacation policy, considered on its own bottom, constitutes a violation of § 8 (a)(3) absent a showing of improper motivation by evidence independent of the policy itself.

The Court attempts to resolve this issue as well as the contractual one. In the Court's view an employer must "come forward with evidence of legitimate and substantial business justifications" whenever any of his actions are challenged in a § 8 (a)(3) proceeding. Prior to today's decision, § 8 (a)(3) violations could be grouped into two general categories: those based on actions serving no legitimate business purposes or actions inherently severely destructive of employee rights where improper motive could be inferred from the actions themselves, and, in the latter instance, even a legitimate business

[3] Article XIV of the contract provided that arbitration would not be required after one party had given notice of intent to terminate or modify the contract. This disclaimer clearly implies that arbitration would be required in the resolution of disputes arising under the contract.

purpose could be held by the Board not to justify the employer's conduct, *Labor Board* v. *Erie Resistor Corp.*, 373 U. S. 221; and those not based on actions "demonstrably so destructive of employee rights and so devoid of significant service to any legitimate business end," where independent evidence evincing the employer's antiunion animus would be required to find a violation. *Labor Board* v. *Brown*, 380 U. S. 278, 286. The Court is unable to conclude that the employer's conduct in this case falls into the first category, and has proposed its rule as an added gloss on the second whose contours were fixed only two years ago in *Brown*.

Under today's formulation, the Board is required to find independent evidence of the employer's antiunion motive only when the employer has overcome the presumption of unlawful motive which the Court raises. This alteration of the burden in § 8 (a)(3) cases may either be a rule of convenience important to the resolution of this case alone or may, more unfortunately, portend an important shift in the manner of deciding employer unfair labor practice cases under § 8 (a)(3). In either event, I believe it is unwise.

The "legitimate and substantial business justification" test may be interpreted as requiring only that the employer come forward with a nonfrivolous business purpose in order to make operative the usual requirement of proof of antiunion motive. If this is the result of today's decision, then the Court has merely penalized Great Dane for not anticipating this requirement when arguing before the Board. Such a penalty seems particularly unfair in view of the clarity of our recent pronouncements that "the Board must find from evidence independent of the mere conduct involved that the conduct was primarily motivated by an antiunion animus," *Labor Board* v. *Brown*, 380 U. S., at 288, and that "the Board must find that the employer acted for a proscribed

purpose." *American Ship Building Co.* v. *Labor Board*, 380 U. S. 300, 313.

On the other hand, the use of the word "substantial" in the burden of proof formulation may give the Board a power which it formerly had only in § 8 (a)(3) cases like *Erie Resistor, supra.* The Board may seize upon that term to evaluate the merits of the employer's business purposes and weigh them against the harm that befalls the union's interests as a result of the employer's action. If this is the Court's meaning, it may well impinge upon the accepted principle that "the right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage." *American Ship Building Co.* v. *Labor Board, supra,* at 309. Employers have always been free to take reasonable measures which discourage a strike by pressuring the economic interests of employees, including the extreme measure of hiring permanent replacements, without having the Board inquire into the "substantiality" of their business justifications. *Labor Board* v. *McKay Radio & Telegraph Co.*, 304 U. S. 333. If the Court means to change this rule, though I assume it does not, it surely should not do so without argument of the point by the parties and without careful discussion.

In my opinion, the Court of Appeals correctly held that this case fell into the category in which independent evidence of antiunion motive is required to sustain a violation. As was pointed out in the Court of Appeals opinion, a number of legitimate motives for the terms of the vacation policy could be inferred, 363 F. 2d, at 134, and an unlawful motive is not the sole inference to be drawn from the conduct. Nor is the employer's conduct here, like the super-seniority plan in *Erie Resistor, supra,* such that an unlawful motive can be found by "an application of the common-law rule that a man is held to intend the forseeable consequences of his conduct."

Radio Officers v. *Labor Board*, 347 U. S. 17, 45. The differences between the facts of this case and those of *Erie Resistor, supra*, are, as the parties recognize, so significant as to preclude analogy. Unlike the granting of super-seniority, the vacation pay policy here had no potential long-term impact on the bargaining situation. The vacation policy was not employed as a weapon against the strike as was the super-seniority plan. Notice of the date of required presence for vacation pay eligibility was not given until after the date had passed. The record shows clearly that Great Dane had no need to employ any such policy to combat the strike, since it had successfully replaced almost all of the striking employees.[4] The Trial Examiner rejected all union claims that particular actions by Great Dane demonstrated antiunion animus. In these circumstances, the Court of Appeals correctly found no substantial evidence of a violation of § 8 (a)(3).

Plainly the Court is concerned lest the strikers in this case be denied their "rights" under the collective agreement that expired at the commencement of the strike. Equally plainly, a suit under § 301 is the proper manner by which to secure these "rights," if they indeed exist. I think it inappropriate to becloud sound prior interpretations of § 8 (a)(3) simply to reach what seems a sympathetic result.

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[4] By July 1, 1963, almost 75% of the striking employees had been replaced. By August 1, 1963, when the dispute over vacation pay was coming to a head almost 90% had been replaced. All strikers were replaced by October 8, 1963.